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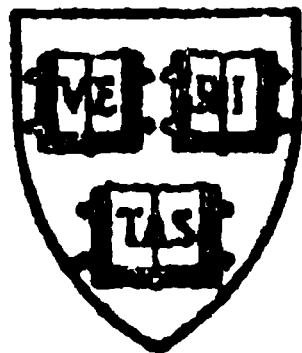
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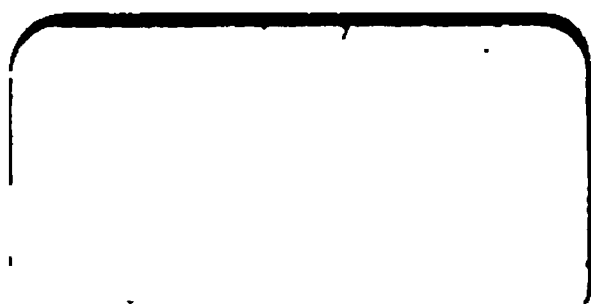
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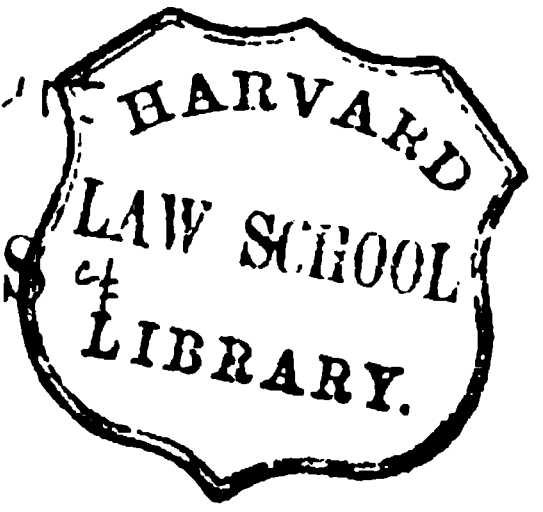
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VOL. 13-INDIANA REPORTS.

INDIANA REPORTS.

VOL. XIII.

Indiana. Supreme Court



REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY GORDON TANNER,
OFFICIAL REPORTER.

VOL. XIII.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM, 1859, FROM
THE FIRST TO THE TWENTY-SECOND DAY, INCLUSIVE.

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J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME,

SAMUEL E. PERKINS,
ANDREW DAVISON,
JAMES L. WORDEN,
JAMES M. HANNA.

Judge DAVISON was Chief Justice at the *November* term, 1859.

No case is expressly overruled in this volume. Numerous cases are adhered to and followed. The more important rulings followed or adhered to are noted in proper places in the INDEX. There are many short opinions *per curiam*, deciding cases for reasons given in cases heretofore decided, of which it was thought unnecessary to make any note in the Index.

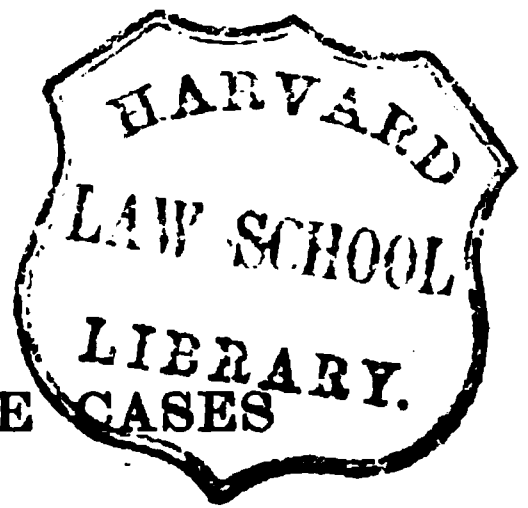


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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

**AT INDIANAPOLIS, MAY TERM, 1859, IN THE FORTY-THIRD
YEAR OF THE STATE, BUT HELD BACK ON PETITIONS FOR
A REHEARING, WHICH HAVE BEEN OVERRULED.**

WILSON v. RAY.*

The contract stated in the pleadings in this case (see the opinion) is executory. Where no time is fixed for the performance of a contract; or where it is to be performed by a certain day (the right to perform it sooner not being precluded); or where the performance depends upon a contingency which may or may not happen within a year, the contract is not within § 1 of the statute of frauds. R. S. 1843, p. 589.—1 R. S. p. 299.

But where, by its terms, a contract is not to be performed within the year; or where it cannot be performed within the year, according to the intent and understanding of the parties, as evidenced by the contract, it is within the statute.

Where the agreement of the defendant upon which suit is brought, is not, in any event, to be performed within a year, it is within the statute, although there may be other stipulations providing for contingencies that would make the plaintiff liable to the defendant within a year, and release the defendant altogether.

A promise to pay money after the expiration of a year, is as much within the statute as a promise to do any other act.

* The petition for a rehearing in this case was filed on the 21st of *July*, and overruled on the 10th of *November*.

May Term,
1859.

WILSON
v.
RAY.

Although a contract may be performed on one side within a year, yet if it cannot on the other, it is within the statute.

Contracts of partnership are as much within the statute as other contracts.

A fraudulent refusal to put a contract in writing cannot have the effect of putting it in writing.

Tuesday,
May 24.

APPEAL from the *Marion* Circuit Court.

WORDEN, J.—Complaint by *Wilson* against *Ray* “that on or about the first day of *June*, 1852, the plaintiff and one *Lawrence M. Vance* were engaged to perform a large amount of work, and to furnish a large amount of materials for the construction of what is known as the *Indianapolis* and *Cincinnati* railroad, in the doing of which work, and the furnishing of which materials, and in order to pay workmen, and furnishers for the same, it became necessary that, in the progress thereof, the plaintiff should raise a large sum of money, to-wit, 300,000 dollars. The plaintiff further says that by the contract for said work and materials with the company to whom said road belonged, they, the plaintiff and said *Vance*, were to receive the greater portion of their pay for said work and materials in the bonds of said company at 75 cents on the dollar, and did receive therefor, of said bonds, to the amount of 350,000 dollars nominally. The plaintiff further says, that in order to raise the money first aforesaid, it became necessary to borrow the same by the creation of commercial paper, from time to time, as the same might be needed, with good indorsers, in view of which necessity the said *Vance* procured one *Hervey Bates* as his indorser, acceptor, and drawer of said commercial paper, on terms then agreed on between them; and the plaintiff, in order to procure an acceptor, drawer, and indorser also as aforesaid, then and there entered into the following agreement with the defendant: The plaintiff then and there promised the defendant that if the defendant would draw, accept, and indorse said commercial paper as the same might be, from time to time, needed, along with said *Bates*, the plaintiff would pay to said defendant one-half of the amount which the plaintiff should realize on the said bonds over and above 75 cents on each dollar of said bonds, provided that

if, on said bonds, he should not realize 75 cents to the dollar, on disposal of them, the defendant would pay to the plaintiff one-half of the loss sustained by the plaintiff by reason of such disposal of them under 75 cents on the dollar; and the defendant, then and there, in consideration of said promise by the plaintiff, promised to him to draw, accept, and indorse for him as aforesaid, and to pay the plaintiff a sum of money equal to one-half of his loss on said bonds, if on the same he should realize less than 75 cents on the dollar. And the plaintiff says that the defendant did so draw, accept, and indorse for him as aforesaid. And he avers that, of said 350,000 dollars of bonds of said company, one-half, to-wit, 175,000 dollars thereof, was then and there, and until the same was disposed of as hereinafter mentioned, the property of and share falling to the plaintiff. The plaintiff further says that said bonds could not be and were not sold, or in any manner disposed of at a rate equal to 75 cents on the dollar, but on the contrary they were, with the defendant's knowledge and consent, disposed of afterwards at much less than 75 cents on the dollar, to-wit, at 60 cents on the dollar, and that the plaintiff's loss on such disposal thereof was, and is, 25,000 dollars; of all of which the defendant then and there had notice; wherefore," &c.

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To this complaint the defendant answered, amongst other things, as follows, viz.:

"That the said supposed agreement upon which this suit is brought was made and entered into on the 15th day of *June*, 1852; and that said contract between *The Indianapolis and Cincinnati Railroad Company* and said plaintiff and said *Vance*, under which the said bonds named in the complaint were to be issued and paid to said plaintiff and *Vance*, was entered into on the 31st day of *January*, 1852, whereby they, the said plaintiff and said *Vance*, were to complete the work embraced in their said contract, and fully comply with their part of said contract by the first of *October*, 1853, and that according to the terms and stipulations of the last-named contract, as well as by the terms and stipulations and recitals of the first-

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named agreement, the said plaintiff and the said *Vance* bound and obliged themselves to hold the said bonds, and to keep them out of the money market, and not to sell or finally dispose of them for the whole period of, and until the expiration of sixteen months from the first day of *April*, 1852, and that the said railroad company should have the right, and could, by giving thirty days' notice to the said *Vance* and *Wilson*, receive back from them the whole or any part of said bonds, by paying in money therefor 85 cents on the dollar at the city of *New York*; provided, however, that such demand to redeem said bonds should be made within sixteen months from the first day of *April*, 1852, and provided also that said *Vance* and *Wilson* should have the right, when such demand was made, to take and receive stock in said company, at par, for the full amount and face of said bonds, which bonds were to be paid to said *Vance* and said plaintiff by *The Indianapolis and Cincinnati Railroad Company*, within ten days after notice in writing from the engineer in charge of the line that the work contemplated in said contract had been fully completed; and the said plaintiff and said *Vance*, in and by the agreement first herein above mentioned, further agreed with the said *Bates* and said defendant that there should be a mutual and equal dividend between the said plaintiff, said *Vance*, said *Bates*, and said defendant, either of advance or loss on said bonds so to be received of said company under their said contract with said company, in the final disposal of said bonds, which disposal should be only made under the concurrent disposal of each of said parties. And the defendant says that the said supposed agreement and promise of said defendant upon which this suit is brought was not by its terms to be performed within one year from the time of making the same, and could not be performed within one year; and the defendant avers that the said supposed agreement was not in writing signed by the defendant, nor by any person by him lawfully authorized, and so the defendant says that said agreement was and is void."

To this paragraph the plaintiff demurred, assigning for

cause that it does not contain facts sufficient to constitute a defense, and that it appears from the paragraph that the contract might have been performed within a year from the making thereof. The demurrer was overruled, and plaintiff excepted.

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The plaintiff then replied as follows, viz.:

“That at the time of the making of the contract herein sued on, the defendant was a director of the railroad company mentioned in the declaration, and also cashier of the *State Bank of Indiana*, from which bank, or some of its branches, it was then, by the parties to said contract, contemplated that the money (or a considerable portion of it) to be raised under said contract as stated in the complaint, should be borrowed. And the plaintiff says that the said *Ray*, for the fraudulent and wrongful purpose of concealing from said company, and from said bank and its branches, his said interest in said bonds, and his said contract, and his said connection with the construction of said road, as stated in the complaint, specially requested the plaintiff that the contract herein sued on should not be reduced to writing and signed by the said *Ray*; and that for said causes alone, and on said request only, said contract was not reduced to writing and signed by the defendant; of which fraudulent and wrongful purpose the plaintiff was then ignorant.”

A demurrer to this replication was sustained, to which ruling exception was also taken.

On the plaintiff failing and refusing to make further reply to the defendant's answer, final judgment was rendered for the defendant, and the plaintiff appeals to this Court.

He assigns three errors—

1. In overruling his demurrer to the answer.
2. In sustaining the defendant's demurrer to his replication, and that without any judgment of *respondeat ouster*.
3. In rendering judgment to the effect that the plaintiff take nothing by his writ, and that the defendant recover of him his costs.

Against the ruling of the Court below on the demurrer

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to the defendant's answer, the plaintiff assumes three positions:

1. That the contract was executed, and not merely executory, and therefore not within the statute of frauds.
2. That it might have been performed within the year; and,
3. That it was a contract of partnership between the parties, and not necessary to be reduced to writing.

The statute in force at the time the contract was entered into provides that "No action shall be brought upon any agreement that is not to be performed within one year from the making thereof, unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized," &c. R. S. 1843, p. 589, § 1.

The provision is reenacted in the same language in the code of 1852. 1 R. S. 1852, p. 299, § 1. It is drawn from the *English* statute of Charles II., and substantially prevails in most, if not all, the states in the *Union*; hence, the decisions in *England* and the other states, under it, will throw much light upon, if not definitely settle, the questions presented.

The first proposition we think is not true in point of fact. We do not regard the contract as being executed, but as executory in its character. The promises were mutual, and dependent one upon the other for a consideration. The plaintiff, in consideration of the defendant's promise, promised the defendant one-half of what he should realize on the bonds over 75 cents on the dollar; and the defendant, in consideration of the plaintiff's promise, promised to become drawer, acceptor, and indorser, &c., for the plaintiff, and to make up to the plaintiff one-half of the loss on the bonds, should they not bring the 75 cents on the dollar. This contract when made was purely executory. No consideration passed from one to the other. The consideration of the promise of each, was the promise of the other.

This being the case, we shall not inquire whether an agreement based upon a past or executed consideration is, or is not, within the statute.

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The second position assumed requires more examination.

We think it is established that where no time is fixed for the performance of the contract, or where it is to be performed by a certain day (not precluding the right to perform sooner), or where the performance depends upon a contingency which may or may not happen within a year, the contract is not within the statute. On the other hand, where, by the terms of the contract, it is not to be performed within the year; or where it cannot be performed within the year according to the intent and understanding of the parties as evidenced by the contract, it is within the statute. A late writer deduces from the authorities the following rule: "The result seems to be that the statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, but that it means to include any agreement which, fairly and reasonably interpreted, does not admit of a valid execution within the space of a year from the making." Browne on Stat. of Frauds, § 273.

At § 283, the same author remarks "that where the manifest intent and understanding of the parties are that the contract shall not be executed within the year, the mere fact that it is possible that the thing agreed to be done may be done within the year, will not prevent the statute from applying. Physical possibility is not what is meant, when it is said that if a verbal contract may be performed within the year, it is binding. Or to speak exactly, it is not enough that the thing stipulated may be accomplished in a less time, but such accomplishment must be an execution of the contract according to the understanding of the parties." See, also, *Boydell v. Drummond*, 11 East, 142; *Herrin v. Butters*, 20 Maine R. 119.

It appears from the answer in the case at bar, that the plaintiff had agreed with the railroad company not to put

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the bonds into market, nor sell or dispose of them, until the expiration of sixteen months from the first day of *April*, 1852, more than a year after the making of the contract between the plaintiff and defendant. It further appears that this stipulation also entered into and formed a part of the contract between the plaintiff and defendant. The time was fixed by the express terms of the contract, within which the defendant could not become liable to pay any loss on the sale of the bonds. They were not to be sold until after the expiration of more than a year, and this stipulation being made a part of the contract between the plaintiff and defendant, was as binding as any other part of it. This is a substantial part of the contract. There might have been very strong reasons of a financial nature for not putting the bonds in market sooner, and the defendant might have been very unwilling to stipulate to bear a loss on the sale of them if they were to be sold before the time specified. By the terms of the agreement the defendant was not liable for any loss until the bonds were sold, and they could not have been sold until after the expiration of more than a year; hence, it is clear that the part of the agreement sued on was not to be performed within the year.

But it is insisted that the contract might have been performed within the year, notwithstanding these stipulations; that the road might have been completed, and the bonds issued to *Wilson* and *Vance*, and then the company might, before the expiration of the year, have elected to take them up at 85 cents on the dollar, in which event, the defendant would have been entitled to his share of the gain, although the year had not expired. Admitting that all this might have been done, it is not perceived how it would take the stipulation of the defendant sued upon out of the statute. The state of things supposed would bring about the contingency on which the plaintiff would, by the stipulations of the contract, be liable to the defendant; but the contingency on which the defendant was to be liable to the plaintiff, could not, by the terms of the contract, happen within the year. If the company took up their bonds at

85 cents on the dollar, the defendant, of course, was not liable. If *Wilson* and *Vance* choose to take stock in the company instead of money, as specified in the contract, the defendant was not liable. In no possible event was he liable but upon a sale of the bonds after the time limited, and a failure to realize the amount specified.

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We are of opinion that where the agreement of the defendant upon which suit is brought, is not, in any event, to be performed within a year, it is within the statute, although there may be other stipulations providing for contingencies that would make the plaintiff liable to the defendant within a year, and release the defendant from liability altogether.

Agreements not to be performed within a year, are within the statute, notwithstanding a contingency may be provided for that may put an end to them within that period. *Browne on Stat. of Frauds*, § 281. See, also, *Harris v. Porter*, 2 *Harring*. 27.

The case at bar is very analogous to that of *Lapham v. Whipple*, 8 *Met.* 59. There *A.* sold to *B.* an interest in a patent right for a sum of money paid down by *B.*, and made an oral agreement with *B.* to repay him said sum if he, *B.*, should not, within three years, realize the same out of the profits of the patent right. The contract was held to be within the statute; that the terms of it indicated that it was not to be performed within a year; that the defendant was not to perform unless the profits for the entire three years failed to yield the sum in question, which, of course, could not be ascertained until the expiration of the three years. So, here, the defendant's stipulation was to pay a share of the loss on the bonds, if a loss should accrue upon the sale of them after the expiration of the time limited, being more than a year from the making of the contract. A sale of the bonds before the time limited would not, by the terms of the contract, involve the defendant in any liability to pay, although they should be sold at a loss.

Lower v. Winters, 7 *Cow.* 263, was this: The plaintiff sold to the defendant his improvements made on certain land, in *February*, 1824, to be paid for in one year from the

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ensuing *March*. It was held that the improvements were no "interest in land," being merely another name for work and labor bestowed upon it, but that the agreement to pay was void, as not to be performed in a year; that payment at a day specified, precludes the idea of payment before the day.

A promise to pay money after the expiration of a year is within the statute, as much as a promise to do any other act. Browne on Stat. of Frauds, § 290.

In *Donellan v. Read*, 3 Barn. and Adol. 899, a doctrine was held that, perhaps, is not fully established in *England*, and is questioned by some of the Courts of this country. There a landlord who had demised certain premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant agreeing to pay an increased rent of £5 a year during the remainder of the term, fifteen years. The landlord having done the work within a year, it was held that he might recover arrears of the £5 a year against the tenant, though the agreement was not in writing. LITTLEDALE, J., in delivering the opinion of the Court, said: "As to the contract not being to be performed within the year, we think that, as the contract was entirely executed on one side within the year; and as it was the intention of the parties, founded on a reasonable expectation that it should be so, the statute of frauds does not extend to such a case. In a case of a parol sale of goods, it often happens that they are not to be paid for until after the expiration of a longer period of time than a year, and surely the law would not sanction a defense on that ground, when the buyer had had the full benefit of the goods on his part."

The doctrine of the above case, as we understand it, is that where the contract has been entirely executed on one side within the year, in a case where it was the intention of the parties, founded on a reasonable expectation, that it should be so executed, the statute does not apply, although performance on the other side was not to take place within a year.

In *Broadwell v. Getman*, 2 Denio, 87, BEARDSLEY, J., de-

livering the opinion of the Court, and remarking upon the case of *Donellan v. Read, supra*, said, "But I would not be understood as yielding my assent to the principle stated, It seems to me in plain violation of the statute. * * *

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The agreement is entire, and if it cannot be executed fully on both sides within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within the year? Such an agreement is not in terms excepted from the statute, and the reason for the enactment applies to it with full force."

We do not, however, in this opinion, wish to approve or disapprove of the case of *Donellan v. Read*, as it is not necessary that we should do so. The case at bar is distinguishable from it. We may remark, however, that in such cases the party would not be without remedy, although no action would lie on the contract, for he may maintain a general *indebitatus* assumpsit against the party who refuses to proceed further under the contract, and thus recover a compensation for what has been advanced and received upon it. *Vide Broadwell v. Getman, supra*, and authorities there cited. It is said that, "Where a verbal contract has been executed on one side by the conveyance of property, or the performance of services, the proper form of action to recover the value of the property or services, is upon the implied promise arising from the plaintiff's performance; implied promises not being embraced by the statute." Browne on Stat. of Frauds, § 124, *et seq.*

In the case before us, there has been no full performance on either side. To be sure, the defendant has performed that part of the contract by which he was bound to indorse, &c., but beyond this there has been no performance on either side. The plaintiff has done nothing towards performing his part of the contract. The contingency has not arisen upon which he was to perform. The part to be performed by him, was to pay to defendant a portion of the gain on the bonds. There has been no gain and he has paid nothing. He has not parted with anything, nor has the defendant received anything.

Admitting it to be true that the contract might have

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been performed on the part of the plaintiff, within the year, by the railroad company taking up their bonds at 85 cents on the dollar, and the plaintiff paying to the defendant his share of the gain; yet nothing of this kind has been done. Indeed, this contract is of such a character that the facts which would render one party liable to pay the other, would release the other from any liability to pay.

The fact that there has been no performance on the part of the plaintiff, he having paid nothing, and the defendant having received nothing, very clearly distinguishes this case from *Donellan v. Read, supra*. The remarks of the Court in that case, would be wholly inapplicable to this.

This case is much more like *Sweet v. Lee*, decided some nine years after. (3 Man. and Gr. 452.)

The plaintiff, a publisher, sued the defendant upon an agreement to prepare a law book for publication, in consideration of which the defendant was to receive £80 a year for five years, and £60 a year for the remainder of his life. The agreement was held to be within the statute. In argument, it was insisted that the work might have been published during the year, but MAULE, J., remarked that although that might be, the annuity could not be paid within that time. *Donellan v. Read* was pressed upon the consideration of the Court, but they held, nevertheless, that the case was within the statute. This case establishes the position that, although the contract may be performed on one side within the year, yet if it cannot on the other, it is within the statute.

On the point that the contract was one of partnership between the parties, and, therefore, not necessary to be reduced to writing, we may remark that we have been referred to no authorities which sustain that position, and we know of none. A contract of partnership concerning an interest in lands, must be in writing. Story on Partnership, § 83. Admitting that the contract amounted to one of partnership between the parties (a point which we by no means decide), still it is not perceived why that should take the case out of the statute. The language of the statute covers contracts of partnership as well as any

other, and if they are not to be performed within a year, we think no action can be maintained upon them unless they are in writing.

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The Court below, in our judgment, committed no error in overruling the demurrer to the answer.

Is the replication valid? We are of opinion that it is not. It cannot readily be perceived how a fraudulent refusal to put the contract in writing can have the effect of putting it in writing. The object of the statute was to require written evidence of the terms of the contract, and thereby to prevent frauds and perjuries in establishing them by parol. The construction sought would not only defeat the object of the statute by permitting parol evidence of the contract, but would open the door to frauds and perjuries still wider, by permitting parol evidence of the fraud charged in refusing to put the contract in writing. Besides this, the fraud charged was not committed upon the plaintiff, but upon the railroad company and the bank. This certainly could not injure the plaintiff.

The demurrer to the replication was properly sustained.

The remaining error relates to the manner of rendering judgment.

The statute provides that "the judgment upon overruling a demurrer, shall be that the party plead over. * * * If a party fail to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default." 2 R. S. p. 123. But this statute is not applicable to the case, as the demurrer was sustained and not overruled. No error in this respect has been pointed out in the brief of counsel, and we see none. On sustaining the demurrer to the plaintiff's replication, and on the plaintiff failing and refusing to make further reply, it certainly was correct to render final judgment for the defendant.

It perhaps should be observed that a demurrer was filed to the complaint, and overruled. Counsel on both sides, in very elaborate briefs, have discussed the validity of the contract, the appellee claiming that it is void on other grounds than the statute of frauds. But we have not felt called upon to determine the questions thus raised, as we

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think they do not legitimately arise in the record. The judgment of the Court below upon the demurrers to the answer and replication, in our opinion, was right, and back of that we do not choose to go, as the judgment must be the same, whether the contract should be held good or bad in other respects.

Per Curiam.—The judgment is affirmed with costs.

O. H. Smith (1), *D. M' Donald*, *A. G. Porter* (2), *A. A. Hammond*, *J. E. McDonald*, and *A. L. Roache* (3), for the appellant.

J. Morrison, *C. A. Ray*, and *H. O'Neal*, for the appellee (4).

(1) The following is an abridgement of Mr. *Smith's* argument:

The defendant demurred to the complaint. The Court overruled the demurrer, and decided that the complaint was sufficient; and, indeed, we look in vain for any possible objection to the complaint. The contract was made by parties able to contract; it is upon a good and sufficient consideration; and the complaint, under our practice, is even more special than was necessary. But we are told that, 1. "It shows the contract declared upon to be a gaming or wagering contract." To this we say, that the contract itself wholly disproves the statement. It is no more a wagering contract than any other contract where the parties agree to share in profit and loss. Besides the high moral and religious character of the parties forbids the idea that they would enter into gambling arrangements.

Again, we are told that this was a mere insurance on the part of Mr. *Ray*, and is void, not being in writing. Does this position require a serious answer? We think not. It is no more an insurance than are all contracts of joint undertaking to share in profit and loss. It has not one of the legal features of an insurance.

Again, we are told that the contract sued on was one where the plaintiff held the event in his own hands, upon which the defendant's liability depended, the plaintiff being at liberty to sell the bonds at any time, at any sacrifice, and hold the defendant liable for half the loss. To this we say, that the inducement on the part of *Wilson* would not be very strong to sacrifice the bonds at less than their value, when he had to suffer one-half the loss. Again, it was for the parties to say who should sell the bonds, and if they made *Wilson* the financial agent, who can complain of their selection? Again, in all partnership transactions, either party may sell and buy, unless expressly restrained. Again, in this case, the bonds were sold with the knowledge and assent of Mr. *Ray*. Surely he cannot complain. We maintain that this is a plain legal contract, upon sufficient consideration between parties able to contract and be contracted with, to share in the profit and loss of these bonds, over 75 cents, to the par of whatever they might be sold for; that the contract was fully performed on both sides, without objection.

It is clear that the Circuit Court held correctly that the complaint was suffi-

cient. We do not complain of that decision, nor assign it as one of the errors.

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The main question is, as to the validity of the sixth paragraph of the answer. We insist that it was wholly and radically defective, and that the Circuit Court erred in overruling that demurrer, for which, if there were no other errors in the record, the case should be reversed.

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This paragraph is no answer to the complaint. It is an attempt to set up the statute of frauds to a contract performed. This cannot be done. There is no principle better settled than that the statute requiring certain contracts to be in writing, only applies to executory, and not to executed contracts, like that before the Court. 2 Story on Cont., § 1015, and authorities.—11 Met. 411.—12 Barb. 90.—15 Maine R. 201. The paragraph does not deny the performance, as alleged in the complaint, but, in fact, admits it, and then sets up the statute of frauds. This, we say, is no answer to this contract, which was fully performed by both parties, even if we admit, for the sake of the argument, that it was a contract required to be in writing, which we deny, and say that this contract never was within the provisions of the statute of frauds. The law is, in all such cases, if the contract might be performed within the year, by the voluntary act of all the parties, the case does not fall within the provisions of the statute. 11 Met. 411.—4 Bing. 40.—19 Pick. 364. Tested by that rule, this case steers clear of the statute; as, if the bonds were delivered by the railroad company to *Wilson* within the year—and the answer does not deny that fact—then they could be sold within the year, and the question of profit and loss would arise within the year, as between the parties to this action.

Again, we say that this was a special partnership between *Wilson* and *Ray*, which was not required to be put in writing. *Wilson* was to furnish the bonds, *Ray* was to indorse and make the commercial paper. The bonds went into the joint stock of *Wilson* and *Ray*, at all over 75 cents to the dollar. They were sold on the joint account, with the assent of *Ray*. The parties were jointly interested in profit and loss, over the 75 cents to the dollar, by the express terms of the contract of partnership. Such partnerships are not required to be in writing. Smith's Lead. Cas. 982 to 985, and numerous authorities.

This brings us to the reply to the sixth paragraph.

The Court sustained the demurrer to this reply, and the plaintiff excepted. The Court rendered a final judgment for the defendant for costs, from which this appeal is prosecuted.

As the law stood at the time of this decision, the demurrer to the reply brought before the Court the validity of the sixth paragraph of the answer, as well as the reply. We have shown that that paragraph of the answer was no bar to the complaint, and, therefore, the demurrer to the reply should have been overruled by the Circuit Court, whether the reply was good or bad. But we maintain that the reply is a sufficient answer to the paragraph, as to the statute of frauds. It avers that the defendant, fraudulently, at his own instance, prevented the contract from being put in writing, and it does not lie in his mouth, after the contract has been performed in good faith on both sides, as if it were in writing, to contend that he can avoid its responsibilities. He cannot be permitted to take advantage of his own wrong. Both the law and common honesty forbid it. 2 Story on Cont., p. 686, § 1015. If there had been a profit to divide, no one would have received it with a better grace than

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he; and, as his expectations were not realized, he ought to bear his share of the loss out of his large estate, and not be permitted to throw the whole loss upon his neighbor and friend, who has acted in good faith with him throughout the whole transaction.

Mr. *Smith's* brief recited the pleadings to which he refers. They will be found sufficiently stated in the opinion.

(2) Messrs. *McDonald* and *Porter* submitted the following argument:

To the foregoing argument of Mr. *Smith*, we add the following observations:

Wilson sued *Ray* on a contract substantially as follows: *Wilson* promised *Ray* that he would pay him one-half of the excess over 75 cents to the dollar which certain railroad bonds to be received by *Wilson* should bring; and in consideration of that promise, *Ray* promised *Wilson* to pay him one-half of the loss on said bonds, if they should bring less than 75 cents to the dollar, and to indorse for *Wilson* certain commercial paper.

To the complaint on this contract *Ray* demurred. The demurrer was overruled. We understand that *Ray*, however, still insists that the complaint is bad; and guessing from his argument below, we suppose the following objections are made to it here:

1. It was urged that *Ray's* promise was not upon a sufficient consideration. We see no ground for this argument, and we see no reason for attempting a display of learning about it. It is a very simple thing. The complaint alleges that the consideration of *Ray's* promise was our promise to divide with him the profits over 75 cents on the dollar which the bonds might bring. Here was promise for promise, which has ever been held a sufficient consideration. Chit. on Cont. 64.—Add. on Cont. 33, and the authorities there cited. The circumstance that these promises stood on contingencies makes no difference. A promise has never been held void for that.

2. Again, it was urged below that this contract was a policy of insurance, and is therefore void for want of a writing. We deny both the premises and the conclusion. We see no reason for either.

It is not true that the contract in question was a policy of insurance. In a very vague sense, any undertaking to indemnify may be called an insurance. But we need not argue that there are many valid engagements for indemnity which do not amount to policies of insurance, in the sense of that phrase in law. An indemnifying bond, a deed of conveyance with covenants of title, a warranty of the quality of goods, and a thousand other things, are in the nature of indemnities, and may depend on future contingencies, but were never thought of as policies of insurance. The fallacy is, that though a policy of insurance always supposes a contingency, yet a contingency in a contract does not necessarily suppose a policy of insurance. The contract of partnership is, as touching the matter of profit and loss, always based on a contingency; but no one ever thought that a partnership contract was, therefore, a policy of insurance.

But we deny the conclusion. "There is nothing in the common law of *England* which appears to render it absolutely necessary that contracts of insurance should be in writing." Ang. on Ins., § 19. And certainly, we have no statute, nor any usage amounting to law, in this state, requiring a writing in contracts of this kind.

3. It has been argued that this is a wagering policy, and a mere violation of our law against gaming. May Term,
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First. It is no wagering policy, because, as we have shown, it is no policy at all; and because a wagering policy is only where there is an insurance "without some interest in the subject-matter" on the part of the person insured. Ang. on Ins., Introduction, §§ 17, 18. Even a wagering policy was valid at common law (*Crawford v. Hunt*, 8 T. R. 13); and they were only rendered void by statute of 29 Geo. II., not in force here. The only question, therefore, is, was this contract a game or wager within our statute against gaming?

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Second. This contract is no violation of our law against gaming. All the law we have on this subject is as follows: "Every person who shall, by playing or betting at or upon any game or wager, either lose or win any article of value, shall be fined," &c. 2 R. S. p. 435. The legal acumen which can discover in the contract under consideration any violation of this statute, must be keen indeed. This statute must, like any other criminal law, be construed strictly. No case can be within it, unless both the spirit and letter of the statute are violated; and we might as well say that the contract violates our usury or election laws, as that it violates our gaming laws? In the contract sued on, was there any playing, any betting, any game, any wager, any winning? Surely not. There can be no violation of this or any other criminal law, without an unlawful intent. The act and the bad motive are indispensable ingredients in every crime and every misdemeanor. Does it appear from the record that such motive existed in the present case?

The appellee has entirely mistaken the nature of this contract. In his eager search after a defense, he has fancied that it must be a policy of insurance, or it must be a wagering policy within the statute of 29 Geo. II., or it must be a gaming contract—he does not seem to know exactly which. It is strange that his fruitful imagination had not stumbled on the obvious conclusion that it is simply a partnership contract.

That it is a contract of partnership, we do not doubt. It possesses every quality which enters into the definition of a partnership. "The very essence of the contract" of partnership, says *Story*, is "a community of interest in the profits of the business of the partnership; that is to say, a joint and mutual interest in the profits thereof, or a communion of profit." *Story* on Part., § 18. Other writers say that its essence consists in the community of profit and loss. *Story* is the more accurate; because it is certain that community of expected profit will make a partnership, though one of the parties agrees to bear all losses. But however this may be, it is perfectly clear that in the contract in this case, there was an agreement both to share in the profit equally, and mutually to be responsible for loss. It must, therefore, be a partnership.

If it be said that this contract cannot amount to a partnership, because it had reference only to a single transaction, we answer that it is certain a partnership may have relation to a single transaction only. *Story* on Part., § 75. —3 Kent's Comm. 30. "To be sure," says Lord MANSFIELD, "there may be a confined partnership." *Willet v. Chambers*, Cowp. 816. See, also, *De Berkow v. Smith*, 1 Esp. 29. There may be a partnership even as to a bill of exchange. 3 Kent's Comm. 30.

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Will it be said that here was no partnership, because there was no joint interest in the property, but only in the profit and loss? We answer in the language of *Chitty*, "that the right to participate in profits, and the liability to contribute to losses, create a partnership, however unequal the shares may be, and although one party has no direct interest in the capital of the firm." *Chit. on Cont.* 213.

In the language, then, of Lord ELDON, in *Langdale's* case, 18 Ves. 300, "The true criterion is whether they are to participate in profit," in determining whether persons are partners. Tested by that criterion, there cannot be a doubt that *Wilson* and *Ray* were partners in this transaction.

Upon the whole, we feel confident that the complaint is good, and that no difficulty can arise as to it.

We also suggest that, since it is now the doctrine that to avail ourselves of a decision on demurrer, there must be an exception to that decision; and that since, according to the doctrine of *White v. Allen*, 9 Ind. R. 562, the appellee cannot insist on such exception, "where there are no cross errors assigned," it may not, as this case stands, be competent to inquire into the validity of the complaint. Still, however, we care very little whether the inquiry be made or not, as we think it can result in no harm to us.

The defendant below filed an answer containing various paragraphs; but we do not deem it necessary to allude particularly to any of them except the sixth, to which we demurred. The Circuit Court held that demurrer not well taken, and overruled it. To that ruling we excepted. As the decision of the case will probably turn on the validity of that paragraph as a defense, we here copy it, as it is found in the transcript. It is as follows: [See opinion.]

Demurrer to said sixth paragraph, as follows:

"The plaintiff demurs to the sixth paragraph of the defendant's answer—

"1. For the cause that the same does not contain a statement of facts sufficient to constitute a defense to this action.

"2. Because by said paragraph it appears that the contract herein sued on might have been performed within a year from the making thereof."

The demurrer was overruled, and the plaintiff excepted.

The plaintiff then filed a reply to the sixth paragraph of the answer. It is as follows: [See opinion.]

To this reply the appellee demurred as follows:

"And the defendant demurs to said plaintiff's reply to the sixth paragraph of the defendant's answer, because it does not set forth facts sufficient to constitute a cause of action against the defendant, and shows to the Court the following cause of demurrer:

"1. That said reply merely alleges a reason for not making the said supposed contract in writing.

"2. That said reply is merely an attempted slander of the defendant, and that under cover of a regular pleading in Court."

This demurrer was sustained, and the appellant excepted.

The Court then, without any order on the appellant to plead over, rendered final judgment against him.

Upon this state of the case, we submit that the Circuit Court erred in the following particulars, all of which are stated in our assignment of errors on the transcript:

I. Said Circuit Court erred in overruling the appellant's demurrer to the sixth paragraph of the appellee's answer.

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That paragraph attempts to set up as a defense that provision of our statute of frauds which renders invalid "any agreement that is not to be performed within one year from the making thereof, unless the promise, contract, or agreement" be written and signed. 1 R. S. p. 300.

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As this provision of our statute is a copy from the *English* statute of frauds, on which numerous decisions have been made, there will be no difficulty in ascertaining its exact meaning, nor any necessity of multiplying citations of authority touching it.

The case of *Fenton v. Emblers*, 3 Burr. 1278, settles the construction of this provision. In that case it is laid down, "That the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within a year."

In *Moore v. Fox*, 10 Johns. 244, it is held that if the thing may be performed within the year, it is not within the act.

The same doctrine is abundantly sustained in the leading case of *Peter v. Compton*. See it and the notes in 1 Smith's Lead. Cas., side p. 143.

This rule has been fully recognized also by this Court in *Wiggins v. Keizer*, 6 Ind. R. 252. That was a much stronger case in favor of the statute of frauds than the present. In that case, the promise was to maintain a child more than six years; and yet it was held not to be within the statute of frauds, because "the child may have died within a year."

This, then, being the rule, the only question is, does the sixth paragraph of the answer disclose a contract which in no event could have been performed within the year? We say the paragraph shows a contract which might have been performed within a year, and which, at the time when made, it was probable even would be performed within a year. We think we can demonstrate this proposition.

It should be observed that the paragraph is a defense by way of confession and avoidance. It admits the whole matter in the complaint; but it attempts to avoid it by the addition of new matter, namely, that the contract stated in the complaint was a verbal contract, not to be performed within a year.

Now it is certain, that to make a good defense, there must be such averments (taking the declaration as admitted) as will plainly show that under no circumstances could the contract be performed within a year after it was made. This the pleader evidently saw he was bound to do. But unfortunately for his defense, in his attempt to do so he has shown a state of facts by which it is made manifest that the contract might have been performed within the period fixed by the statute. That state of facts is plainly seen in that part of the paragraph which reads thus:

"Said plaintiff and said Vance were to complete the work embraced in their said contract (on which the bonds were to be paid), and fully comply with their part of said contract by the first of *October*, 1853, and that according to the terms and stipulations of said last-named contract (to do the work for the bonds), as well as by the terms and stipulations and recitals of the first-named agreement (the contract sued on), the said plaintiff and said Vance bound and obliged themselves to hold the said bonds, and to keep them out of market,

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and not to sell nor finally dispose of them for the whole period of, and until the expiration of sixteen months from the first day of *April*, 1852; and that said railroad company should have the right, and could, by giving thirty days' notice to the said *Vance* and *Wilson*, receive back from them the whole or any part of said bonds, by paying in money therefor 85 cents on the dollar, at the city of *New York*; provided, however, that such demand to redeem said bonds should be made within sixteen months from the first day of *April*, 1852."

Now, upon these allegations, the following things appear to be certain and beyond all doubt:

1. The work on which the bonds were to be paid might have been performed within the year after the contract sued on was made, and the bonds might have been paid to *Wilson* within that time; because it is said the work was to be done, not at the end of any period, but "by the first of *October*, 1853," and because it appears that the "bonds were to be paid to said *Vance* and said plaintiff within ten days after notice in writing from the engineer in charge of the line, that the work contemplated in said contract had been fully completed." We need not stop here to argue that where a man agrees to do a thing by a fixed day, or within a fixed time, he may do it before that day, or on any day within that time."

2. It is certain, that, by the contract on which the railroad company was to pay the bonds, *Wilson* might have realized 85 cents on the bonds within the year after he made the contract with *Ray*; because it was expressly stipulated that the company "should have the right," "by giving ten days' notice," to "receive back from them the whole or any part of said bonds, by paying in money therefor 85 cents at the city of *New York*;" and this they might do at any time "within sixteen months from the 1st day of *April*, 1852."

3. It follows, therefore, with equal certainty, that, not only the contract sued on, but all the contracts stated in the record, might have been performed within a year after they were made.

Now, let us test this reasoning thus: Suppose that *Vance* and *Wilson* had completed their railroad contract in six months from the time of making it; and suppose that, upon ten days' notice immediately thereafter by the engineer, the company had paid them for their work in the bonds in question; and suppose that two months thereafter the company had, on thirty days' notice to *Vance* and *Wilson*, paid them 85 cents to the dollar in cash on their bonds, and taken them back; and suppose, further, that *Wilson* had then divided with *Ray* the profit, according to the contract sued on:—supposing all this, can any one doubt that these transactions would have been a perfect performance of all the contracts named in the record? Surely no one can doubt it. Surely no one can say that these supposed transactions would not have been a perfect and legal fulfillment of all these contracts, both in their letter and spirit, and no departure from them in any respect whatever. Now, we repeat, it is certain that all this might have been done. It is thus demonstrable that the contract sued on might have been performed within a year from the making thereof.

But let us alter a little the foregoing supposition, and let us suppose that all was done as above stated within the year, except the division of the excess over 75 cents on the dollar between *Wilson* and *Ray*; and instead of that, let us suppose that *Ray* had sued *Wilson* for *Ray's* share of this excess. In such a case, could *Wilson* have pleaded this provision of the statute of frauds?

Certainly not. And just as certainly *Ray* cannot plead it when he is sued, and precisely for the same reason, namely, it was a contract which might have been performed within a year after it was made.

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(3) Messrs. *Hammond*, *McDonald*, and *Roache* submitted a petition for a rehearing, as follows:

In this case, the counsel ask for a new hearing, not only on account of the magnitude of *Wilson's* interest, but also on account of the general importance of the principles involved—or, rather of the application of principles well settled to the facts of this case.

The point we desire the Court to review arises on the sixth paragraph of the answer. We contend the demurrer should have been sustained to that paragraph, not because it is not in itself a good answer; but because it is not responsive to the complaint. It admits the allegations in the complaint, but seeks to avoid them by setting up new matter—the statute of frauds—that the contract was not to be performed within a year.

We contend that the complaint shows the contract sued on to have been executed so far as to take it out of the statute.

In the learned and elaborate opinion of the Supreme Court, the doctrine that an executed contract is not within the statute, is fully recognized; and the Court place their judgment on the ground expressly, that this was a contract not to be performed within a year, and that it has not been executed.

For the sake of the present argument, we admit that the contract sued on was not to be performed within a year; but we do insist that the complaint shows a performance. And on this point, we earnestly ask the Court to allow us a further hearing.

In the opinion of the Court, stress is laid on the fact that *Wilson* has done nothing towards performing his part of the contract; that his part was to pay the defendant a portion of the gain on the bonds; and that he has not parted with anything, &c.

What is the contract set up in the complaint?

It alleges that *Wilson* and one *Vance* had contracted with *The Indianapolis and Cincinnati Railroad Company* to do a large amount of work, &c., for which they were to receive compensation in bonds, at 75 cents; that in the prosecution of this work, it would be necessary to raise a large sum of money, to-wit, 300,000 dollars, and to raise this money, it was necessary to have drawers, acceptors, and indorsers; that *Vance* procured *Bates*, and *Wilson* procured Mr. *Ray* to draw, accept, and indorse, for the purpose of raising the funds needed in the prosecution of the work on the railroad. The agreement between *Wilson* and *Ray* was, that if the bonds should be sold for more than 75 cents, *Ray* should be entitled to one-half of the excess; but if for less, then he should make up one-half of the deficiency to *Wilson*.

Now, to test “what was to be performed” by each party, let us suppose the contract to have been in writing. What was *Wilson*, under such a contract, bound to do? Clearly, he was obliged to procure the railroad bonds mentioned in the contract—in other words, he was bound by his agreement with *Ray*, to fulfil his contract with the railroad company, so as to be able to furnish the bonds he was bound to furnish. In their agreement, they refer to that contract as subsisting, and the performance of the work therein specified, as the means by which *Wilson* was to procure the bonds. If *Wilson* had failed

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to procure and furnish the bonds, is there any doubt but that *Ray* could have maintained an action for the breach of contract?

On the other hand, *Ray* was bound to draw, &c., such commercial paper as was necessary in doing the work on the railroad. If *Ray* had refused to draw, indorse, &c., could not *Wilson* have maintained an action against him for that refusal?

Now, this agreement was not in writing. One party could not compel a performance by the other, nor sue for a breach. But the contract is not void. The statute of frauds does not affect the contract; but only the remedy. The Courts will not lend their aid to enforce it. But it is voidable, at the option of either party. If either refuses to execute, the statute cuts off all remedy against him. But if the parties choose to execute, the statute will not prevent the execution. *Hadden v. Johnson*, 7 Ind. R. 397, and authorities cited.

If, then, the parties elect to perform the contract, and do perform it, what legal consequences flow from the performance? Clearly, the results which the parties had agreed should flow from it. We venture to say, that no adjudged case can be found, of respectable authority, in which it has been held, that after performance, the parties were not compelled to adjust their rights growing out of the performed contract, in accordance with their agreement.

But the complaint, in the case at bar, alleges that *Wilson* did perform the work on the railroad, and furnish the bonds, according to his contract; and that *Ray* did draw, indorse, and accept the necessary commercial paper. Was not this a performance by each party of what, by the contract, he was to do? Everything contracted to be done, by either party, was done. There only remained to strike the balance of profit or loss. This was the result or fruit of what had been done. It was not a thing to be performed; but a mode fixed by the parties themselves, for disposing of the results of what they had agreed to do, and had done in pursuance of that agreement.

Do no rights grow out of such a performance? *Wilson* underwent all the toil and risks of performing his half of 300,000 dollars' worth of work on the railroad, in the belief that *Ray* would perform his undertaking, and that they would share the profits and losses mutually. *Ray*, also, in pursuance of his agreement, raised the necessary funds, and did all his obligation required on his part. If profits were the result of their joint, mutual labors, to whom did they belong? to him who first got his hands on them? If large profits had grown out of the transaction, and *Wilson* had got them in his possession, would *Ray* have been without remedy? If so, it must be because the Courts are powerless to decide upon the rights of parties growing out of their acts. Such a construction would enable a party to use the statute of frauds as a pretext to perpetrate frauds. Surely, when the parties to an agreement have both done all the acts, assumed all the liabilities and hazards, which, by the terms of their agreement, were contemplated as the basis for a division of the profits and losses, the Courts will not, at that point, interpose the statute of frauds, and enable one party to perpetrate the most enormous frauds on the other. Such an application of this principle would work great and numerous hardships. A large proportion of the daily transactions of the community are to be affected by it.

We insist that this case does not fall within the statute of frauds, because the contract was executed; and we submit that an opposite construction involves a mistake as to the essential character of the agreement. An analogy

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seems to be drawn, both in the briefs of counsel and in the opinion of the Court, from a numerous class of cases cited, in which, for some article sold or service done, on one side, the other agrees to pay money. There the payment of the money is all that is contracted to be done on that side. Being the only thing agreed to be done, on the one side, the Courts hold very properly that there is no performance until the money is paid. But in this case, the payment of the money is not the thing contracted to be done. That is only a consequence to grow out of the acts agreed to be done by both parties. The acts agreed to be performed, were, on the part of *Wilson*, furnishing the bonds; on the part of *Ray*, indorsing, &c. This was done in accordance with the agreement. It was supposed, at the time, that profits would, and it was contemplated that losses might, result from the enterprise; but these profits or losses were results simply of the things contracted to be done. And all that is said about the payment of money by *Wilson* to *Ray*, or *Ray* to *Wilson*, is simply providing a rule for the decision of profits or losses, arising out of the work when done and completed on both sides.

We ask, also, for a new hearing, on the ground that the contract was one which, by its terms, might have been performed within a year. On this point, we refer the Court to *Artcher v. Zeh*, 5 Hill, 500; *Rake's adm'rs v. Pope*, 7 Ala. R. 171; *Cherry v. Heming*, 4 Exch. R. 631; *Moore v. Fox*, 10 Johns. 244.

We have cited no authorities on the first point, because we do not mean to dispute the law as laid down by the learned judge delivering the opinion; but only to contend that it has no application to the contract set up in the complaint.

(4) The following is an abridgement of the argument of Messrs. *Morrison*, *Ray*, and *O'Neal*.

There is no error in the case except against the appellee.

1. The demurrer to the complaint, we think, should have been sustained by the Court; and, as the proper exception was entered, to the overruling of that demurrer, we suppose that that question is still saved, and is properly before this Court. If we are right in this, and the complaint is bad, as not setting forth facts sufficient to constitute a cause of action, the judgment must be affirmed.

2. The Court committed no error in sustaining the demurrer of the defendant to the plaintiff's reply to the sixth paragraph of the answer, as we shall attempt to demonstrate presently; and if the Court should even hold that the sixth paragraph is bad, still the demurrer to it reaches back to the complaint.

We are aware that this Court, in *Johnson v. Stebbins*, 5 Ind. R. 364, and in *Gimbel v. Smidth*, 7 id. 627, ruled differently; but that was previous to the act of 1855 (p. 60), which amends the section upon which those decisions rest, so as to conform to the *New York* statute, and the *New York* decisions upon that statute. The amendment of the section being made in view of what this Court showed to be the difference between the two, it proves that the legislature of *Indiana* preferred the *New York* rule, which must, of course, be now considered the *Indiana* rule.

Our first proposition is, that the complaint is bad, because:

1. It shows the contract declared upon to be a gaming, or wagering contract.

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2. That the contract, if regarded as one of insurance against loss on the sale of the bonds, is void, it not being averred to be in writing.

Is the contract a gaming or wagering contract?

A contract is defined by *Blackstone* (2 Comm. 446) "to be an agreement, upon sufficient consideration, to do or not to do a particular thing." By the civil law, which *Parsons*, in his work on contracts, says, is "logically exact and exhaustive;" considerations are divided into four species:

1. *Do ut des*, as when I give money or goods on a contract, that I shall be repaid money or goods again for them.

2. *Facio ut facias*, as when I agree with a man to do his work for him, if he will do mine for me; or, to do any other positive act on both sides.

3. *Facio ut des*, as when one agrees to perform anything for a price.

4. *Do ut facias*, as when I agree to give a servant wages for his work.

In every species of valid contracts, some act is to be performed or thing of value given, upon the return, or promise to return, an equivalent in valuables or labor. *Bouvier* and *Burrill* both define a wager to be, "A contract by which two parties, or more, agree that a certain sum of money, or other thing, shall be paid or delivered to one of them, on the happening or not happening of an uncertain event." See their Dictionaries.

The distinction, then, between a contract and a wager, is this: the contract is founded on a consideration, which passes from both parties to both parties. The wager is founded on a consideration, which, on the happening or not happening of an uncertain event, must all pass to one of the parties.

The agreement in the complaint set forth, then, is what?

If the stock market happened to be depressed, and the bonds sold at less than 75 cents, as was the case, the defendant is to lose half that sacrifice. Now what has he received to repay that loss? Nothing! Then it is not a legal contract. But, argues the complainant, he had his chance that the uncertain event would happen the other way, and then he would have received something. So, whether the defendant should receive anything or nothing, depended not on the value of his indorsement; but whether he should receive a profit or sustain a loss, depended simply on the happening or not happening of a future uncertain event. The stocks were owned by the plaintiff. He says to defendant, the chance of a rise in the stock market is greater than the chance of a decline, therefore, you pay me a premium—that is, indorse my paper, and you shall have the chance to receive half the amount of the rise in the price of stocks, for risking half the loss by a decline. It matters not whether the stake was half the profit or loss, or the whole profit or loss. The principle is the same. On the happening of the uncertain event, the stake was to be paid by plaintiff to defendant. On the not happening of that event, the stake was to be paid by the defendant to the plaintiff. This is a wager, according to all the authorities.

But the plaintiff says there was another consideration, to-wit, the defendant's indorsement for plaintiff. In other words, the defendant thought the chance for making money by the venture so much greater than the risk of loss, that he paid the plaintiff a *bonus* to get into the contract of wager. Now, what has the consideration or *bonus* to do with the contract itself? Evidently nothing. If two persons propose to wager 100 dollars, on the result of an election, and the chance is counted 10 per cent. better for the one than for the other,

and, therefore, the one pays the other 10 dollars as a *bonus* to induce him to make an even wager, does the amount so paid render the bet valid, so that the party paying the *bonus* can be compelled to pay the entire stake if he should lose the wager? The money paid as inducement to a contract, neither makes the contract itself legal or illegal. This we assume to be good law, as well as sound logic, and a full answer to the argument.

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The consideration, and the only valid consideration, is paid by the party sought to be charged; and it will not do for the plaintiff to say, that although he never gave any consideration for the promise to which he seeks to hold the defendant, yet that the defendant has paid such a consideration; or, that because the plaintiff has received so much from the defendant for nothing, he is, therefore, entitled to claim a still larger sum.

Parsons, in his work on Contracts, vol. 1, p. 857, says, that "the fundamental distinction in the common law between valid considerations, are those cases where the consideration is a benefit to him who makes the promise, and those in which it is some injury to him who receives the promise." In these two divisions, he embraces all valuable or good considerations. Now, was the consideration which it is conceded the defendant paid, to-wit, his indorsement, of any benefit to him who promised to make good the plaintiff's loss—or was the defendant's indorsement any injury to the plaintiff? Neither. So, even if it could be shown that the indorsement by defendant of plaintiff's paper, was part of the consideration of the contract, still, as defendant only paid the consideration, and received nothing in return, he cannot be charged under this contract.

The indorsement by defendant, was manifestly a *bonus*, paid by him for the privilege of taking the chance of receiving half the profits, in consideration of risking the chance of half the loss.

The contract, then, is founded upon a consideration, which, by the "logically exact and exhaustive definitions of the civil law," and by the divisions of the common law, is illegal. It is a contract which fills every definition of a wager so fully, that it seems impossible to place it in any other category. A contract by which the question of who shall receive the profit, if there be a profit, or who shall pay the loss, if there be a loss, is not to be determined by any act performed by either party, or by any consideration paid by either party, but by "the happening or not happening of a future uncertain event." By the contract, the profit does not pass to the party who paid the consideration, if any was paid, but depends upon the uncertain event. This certainly fills the definition of a wager most fully.

But it was argued by the counsel for the plaintiff, that a wager was distinguished from a legal contract, in this: A wager was concerning a subject-matter in which neither of the parties had any interest; and that ownership or interest in the subject of the agreement, renders the contract legal. In the case of *Hall v. Bergen*, 19 Barb. 126, JOHNSON, J., rendering the opinion of the Court, says:

"Though differently inclined upon the argument, a careful review and consideration of the provisions of the contract, and particularly that upon which the action is founded, have satisfied me entirely, that the referee was right in his conclusions, and that it is in the nature of a stake or wager, and consequently void by statute. The plaintiff paid 800 dollars for one-half of the animal, and after the contract, owned her as tenant in common with the de-

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endants. It is then provided, as part of the contract of sale, that the mare shall, on or before the 15th of August next, trot in harness, around the *Rochester Union Course*, in two minutes and thirty-four seconds; and in case she fails, or is unable to perform, that then the defendants shall deduct or pay back to the plaintiff, one-half of such sum as such failure may detract from the market value of said mare. The action is brought upon this provision to recover back, the complaint alleging a failure of the mare to perform, after repeated trials. Here a trial of speed is agreed upon, and the right of action rests solely on the failure of the animal, on such trial, to make the distance within the time. What is this but a race—a trotting match against time? Whether the plaintiff was entitled to anything or not, depends entirely upon the result of this trial of speed. And it is clear, I think, that this is nothing more nor less than a wager of an uncertain amount, under the guise and formality of a contract of sale. The contract is skillfully drawn, but the drapery does not conceal the vicious principle from careful observation. The case, in this respect, does not differ in principle from that of *Brogden v. Marriott*, 3 Bing. (N. C.) 88. * * * * * The provision in question is not a mere warranty of the capacity or qualities of the animal. It is more. It is an agreement to forfeit and repay the price advanced, or a portion of it, in case she fails to perform.”

This decision fully answers the argument, that either party being interested in the subject-matter, will take the case out of the statute against wager and gaming. R. S. 1843, ch. 34, § 3.—1 R. S. ch. 45, § 1.

But we contend that the case cited establishes something more. A valuable consideration had been paid, as in the case before the Court, and yet that consideration did not make the contract good. In that case, the party paying the money or giving the valuable consideration, received something in return—an interest in the horse; but the plaintiff, *Wilson*, has given nothing in return for defendant's indorsement. In the one case, the determination of the question whether the party was entitled to anything or not, depended upon an uncertain event—the trial of speed. In the case under consideration, the same question was to be determined by an equally uncertain event—the rise or fall of the stock market. In the one case, the party who had given the valuable consideration, sued for a recovery upon the happening of the uncertain event. In this case, the party who has already received the valuable consideration, and given nothing therefor, sues upon the happening of the uncertain event. The principle is the same, and in neither case can a suit be sustained. The contract is void, as being a wager, and within the statutes cited.

But the contract was not only a wager, but one in which the plaintiff held the event on which defendant's liability depended, in his own hands; being at liberty to sell the bonds at any time, at any sacrifice, and still hold the defendant liable for the loss.

We refer the Court to a case in 45 Eng. Com. Law, 887, 4 Ad. and El. (N. S.) *Fisher v. Waltham*. That was a case where an attorney's clerk being about to pass his examination for admission to the practice of his profession, made a contract with one *B.* that if he, said clerk, should pass the examination and receive the certificate of his fitness, &c., he would pay certain articles to *B.*; but if said clerk should fail to receive said certificate, then said *B.* should pay the said articles to the said clerk. It was held by the Court, “that there was a fatal objection to the contract, namely, that one of the parties had the event

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in his own hands." In that case, the suit was brought after the party who held the event in his own hands had passed his examination, and had thus lost his forfeit, showing that he had not used any undue advantage; and yet the Court allowed the other party to take advantage of this defect in the contract. Much more should the defendant have the advantage, when the party who thus held such an unconscionable power over him, brings his action to enforce a loss which may have resulted from this very advantage. The plaintiff owned these bonds, and he had the right to sell them when and to whom and for the price he pleased; he has done so, and now asks us to make good his loss. Certainly, it is a case where the principle laid down in *Fisher v. Waltham* will apply most strongly against the plaintiff.

But, if this is not a wager, if it is not void because the party who now seeks to enforce it, held the event on which depended our liability, in his own hands, let us see if it may be classed as a contract of insurance.

Insurance is defined by *Angell*, in his work on Insurance, § 3, to be "A contract by which one of the parties binds himself to the other, to pay him a sum of money, or otherwise indemnify him, in the case of the happening of a fortuitous event, provided for in a general or special manner in the contract, in consideration of the sum of money which the latter pays, or binds himself to pay to him."

"The party who takes upon himself the risk is called the insurer, and sometimes the underwriter, from the party subscribing his name at the foot of the policy; the party protected by the insurance is called the insured. The premium paid by the latter, and the peril assumed by the former, are two correlatives, inseparable from each other, and the union constitutes the essence of the contract." *Id.*, § 7. "Premium—The sum paid or agreed to be paid by an assured to the insurer, as the consideration for the insurance, being a certain rate per cent. on the amount insured." 1 Phil. on Ins. 205.—3 Kent's Comm. 253.—Burrill's Law Dict., tit. Premium.

Now, in this case, there is no premium paid, or agreed to be paid. If plaintiff lost, defendant agreed to make the loss good to a certain extent, for which he would receive nothing. There is no premium, and the essence of the contract is, therefore, wanting. We cannot, then, see how the contract can be classed as one of insurance.

And here we would say, that we do not class this as a wager policy. The Courts do hold, that where the contract is drawn in the form of a policy signed by the parties, and a premium paid, unless the party insured has an interest, the contract is a wager policy, and void. But here, the policy and the premium are wanting; and the contract can neither be a policy of insurance nor a wager policy, but simply a wager.

Although the agreement was one in which a consideration was not given and received by both parties, but was dependant upon the happening or not happening of an uncertain event, all the consideration passing to one party, yet if the Court consider it not a wager, and not void because one party held the event in his own hands, but a contract of insurance, then we insist that the contract must be in writing, and signed by the party to be charged, and must be so pleaded.

The case of *Cockerill v. The Cincinnati Mutual Insurance Co.*, 16 Ohio R. 148, decides the following points:

"A policy of insurance must be in writing.

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"A verbal waiver of a forfeiture of a policy of insurance, is not binding.

"A verbal agreement that a policy which has been perfected by a transfer of the interest of the assured by judicial sale, that on repurchase by the assured, of the property originally insured, the policy shall re-attach and continue in force during the unexpired term, must, whether regarded as a waiver of a forfeiture, or a verbal policy, or an agreement to continue the old policy, to have any binding force, be in writing."

On the 168d and 164th pages of the opinion of the Court, the following language is used:

"1st. Is a verbal policy known to the law of insurance?

"Insurance is a branch of the law merchant, and its nature and principles spring from commercial usage, to which we are to look for the forms and mode in which it is reduced to practical action, in cases not determined by positive decision, or the rules of municipal law. The form of giving effect to the indemnity, is by a written instrument, containing the consideration, terms, and stipulations of the contract of indemnity between the underwriters and the insured, called a policy. It is universal commercial usage, that this policy shall be in writing, and there is no exception to it in positive decision, or municipal regulation. Such a thing as a verbal policy of insurance, is unknown to the law of insurance. All the books upon the subject, and decisions, unite in declaring that a policy must be in writing. And in every instance, where the municipal law has created and empowered corporations to enter upon the business of insurance, it has required that the contract of insurance, or the policy, must be in writing, and signed by the party to be bound. It is so in the act incorporating the insurance company now in question. To hold that there could be such a thing as a verbal policy, would be contrary to all commercial usage, and the authority of all the books and decisions, and in this case, would be in opposition to the spirit and express requirement of the act of our legislature, creating the company. * * * * *

* * * * * But without the act, we should hold that a policy of insurance upon the principle of general usage must be in writing, as supported and declared by universal adjudication."

The plaintiff's counsel, however, insisted, that although a policy of insurance must be in writing, a contract of insurance need not be. In the case cited, the party having forfeited his policy, sought to recover on a verbal contract of insurance; and the Court held that there was no way of making a contract binding, except by reducing it to writing. This play upon words cannot avoid the effect of the decision.

But not only must a contract of insurance be in writing, but it must be so pleaded. In *Duppa v. Mayo*, 1 Saund. 276, note 2, is the following language:

"The difference is holden, that where a thing is originally made by act of parliament, and required to be in writing, it must be so pleaded, with all the circumstances required by the act, as in the case of a will of lands, to have been in writing. But where an act makes writing necessary to a matter where it was not so at common law, it is not necessary to plead the thing to be in writing, though it must be proved so on the trial. A lease for a longer term than three years, need not be pleaded to be in writing, but must be so proved, (2 Salk. 519, anon)." The lease for over three years need not be pleaded to be in writing, because it could have been verbal at common law; but we have seen that a policy or contract of insurance never could have been made except

in writing. In the above case (2 Salk. 519), it is held that where a statute created a new thing in writing, it must be so pleaded; but where it only adds it to a common-law matter, it need not. The contract of insurance, in its very origin, was required to be in writing, and, therefore, should have been so pleaded.

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Still more strongly can we insist upon the objection, under our own statute, requiring all contracts to be set forth with the pleadings. This point we consider settled by this Court, in the case of *Resor v. Resor*, 9 Ind. R. 349, 350.

The plaintiff's counsel denied the contract to be a wager, and yet were unwilling to have it classed as a contract of insurance, although that was the original ground upon which they defended the contract; and they attempted to limit the subject-matter of insurance, to loss by fire, or marine insurance, or insurance upon life.

This position they assumed, after having themselves produced authorities, with which your Honors are familiar, that distinguish between wager policies of insurance (not simple wagers), upon the price of bonds, stocks, &c., and legal policies of insurance in writing, by the test of ownership in the bonds and stocks insured. In these cases, there existed both the premium paid, and the policy; and the Court regarded the subject-matter as within the protection of an insurance. The counsel for the plaintiff pointed to the test of ownership, as distinguishing a wager policy from a legal one, and not the subject-matter insured.

The counsel also claimed that the contract was one of partnership.

In 3 Kent's Comm., 5th ed., p. 24, partnership is defined to be "A contract of two or more persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions."

Let the definition be applied to the facts, as shown by the plaintiff's complaint. It is not alleged that the defendant owned the bonds, or had any interest in them, as part owner. They were the sole property of the plaintiff, as he has said. The defendant had placed neither money, effects, labor, nor skill, in them. Nothing of the kind is averred. True, the defendant indorsed the plaintiff's paper, the plaintiff agreeing to give him one-half the profits upon their sale, for such indorsement, and the defendant agreeing to bear one-half the loss. Is there a single element of partnership in such an agreement? We can perceive none.

The contract was also called by counsel, a warranty. A warranty, is either a part of a contract of sale, or of a contract of insurance. In the latter case, it is made by the party insured, and must be in writing. Bouv. Dic.

But what was the consideration for the warranty, if it be such? They may call it what they please, but they must show a consideration.

It was also argued that a contingent consideration was good.

What is a contingent consideration?

We are at a loss here, for we find nothing of the kind in the books. The books define a contingency, to be an event that may or may not happen. Is it meant that an event that may or may not be a consideration, is good to support a contract? If so, we deny it. *Parsons* says a consideration must be something of value.

But the plaintiff says, as the defendant paid a good consideration, and could

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have held the plaintiff to the agreement, therefore, the plaintiff can hold the defendant.

Now the law, as we understand it, is, that if the consideration is illegal, the contract is void. Was, then, the consideration legal, irrespective of the defendant's agreement to indorse? Was the chance consideration of risking a loss on stocks, against a profit on stocks, a legal consideration? Certainly not. Then the joining of a legal consideration with an illegal one, does not help the case. See 1 Parsons on Cont. 380; Story on Cont. §§ 458 to 461. In the case in 19 Barb., cited heretofore, the payment of 800 dollars failed to render the contract valid, even in favor of the party paying, and against the party receiving; and certainly, it cannot render valid an illegal claim against the party who has paid the consideration and received nothing therefor. But the indorsement was merely a *bonus* to enable the party to share the speculation. The contract was a risk of profit against a risk of loss, and illegal, as being a wager upon the price of stocks in the market.

The whole transaction may be paraphrased thus:

Wilson, the plaintiff, had a contract with the railroad company, by which he was to receive 350,000 dollars, in the bonds of the company, at 75 cents on the dollar. To enable him to carry out his contract, he is obliged to raise money on loan, and he must procure an indorser. He applies to *Ray*, the defendant, who consents to indorse for him, on the condition that he is paid for it. *Wilson* then proposes to give him one-half the profits that he may realize over 75 cents on the dollar; provided he, *Ray*, will indemnify him, *Wilson*, against one-half the loss he may sustain on such sale. The proposition was agreed to.

What is the consideration for the indemnity against such loss?

We respectfully submit, that for the reasons stated, the complaint is substantially bad; and that, therefore, the judgment of the Circuit Court should be affirmed.

The remaining question is, whether, or not, the Circuit Court erred in sustaining our demurrer to the plaintiff's reply to the sixth paragraph of the defendant's answer. We are fully convinced that the ruling, as to that, was correct.

The sixth paragraph of the answer, is a plea of the statute of frauds; and avers that the agreement and promise upon which the suit was brought, was not, by its terms, to be performed within one year from the time of making the same, and could not be performed within one year; and that said agreement was not in writing, signed by the defendant, nor by any person by him lawfully authorized, and so said agreement was and is void.

To this paragraph, the plaintiff, after filing a demurrer to it, which was overruled, filed the following reply: "That at the time of the making of the contract sued on, the defendant was a director of the railroad company named in the complaint, and was also cashier of the *State Bank of Indiana*, from which bank or some of its branches, it was then, by the parties to said contract, contemplated that the money (or a considerable part of it), to be raised under said contract, as stated in the complaint, should be borrowed. And the plaintiff alleges that the said defendant, for the fraudulent and wrongful purpose of concealing from said company, and from said bank and its branches, his said interest in said bonds, and his said contract, and his said connection with the

construction of said road, as stated in the complaint, specially requested the plaintiff that the contract herein sued on should not be reduced to writing, and signed by said defendant, and that for said cause alone, and on said request only, said contract was not reduced to writing and signed by the defendant. Of which fraudulent and wrongful purpose the plaintiff was then ignorant."

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To this novel evasion of the plea of the statute, the defendant filed a demurrer, "Because said reply does not state facts sufficient to constitute a cause of action against the defendant; showing the following causes of demurrer, viz.:

1. That said reply merely alleges a reason for not making the said supposed contract, in writing.

2. That said reply is merely an attempted slander of the defendant, and that under cover of a regular pleading in Court.

Parsons, in his treatise on Mercantile Law, p. 71, says: "The statute of frauds, so called, was passed in the twenty-ninth year of *Charles II.*, 1677, for the purpose of preventing frauds and perjuries, by requiring, in many cases, written evidence of a contract." In the same author's treatise on the Law of Contracts, vol. 2, 2d ed., pp. 285, 286, the following language is employed: "It is obvious, that the most general purpose of these sections is to permit no party to bind himself, except by a written promise signed by him; because this will secure an exact statement, and the best evidence of the terms and conditions of the promise."

We are informed, however, by formal pleading by able counsel, that on a contract upon which our statute says, "No suit shall be brought, unless the contract," &c., "shall be in writing, signed by the party to be charged," a suit may be brought, and the express prohibition of the statute nullified, by an allegation that the party refused to sign a written agreement on the subject.

The plea alleges fraud in the defendant, in failing to make a legal contract; and he is sued for not making a legal contract.

The statute is positive, that the agreement, to be valid, shall be reduced to writing, and signed by the party to be charged.

The reply admits that the contract was not reduced to writing; but it does more; it avers that the mind of one of the parties never contemplated or consented that the agreement should be reduced to writing. It admits not only that the legal evidence of a contract is wanting; but, in effect, admits also that the contract itself was never made, because it admits that it was never evidenced in the only mode that such contracts must be evidenced.

There was no legal obligation on either party, requiring him to consent to have it put in writing; and for whatever reason he may have declined, that reason could be no fraud on the other party. What wrong is done one party by the refusal of the other party to put an agreement in writing, unless relying upon the agreement, something is done in pursuance of it, that raises an equity in his favor that entitles him to relief?

But the reply does not allege our intention to commit a fraud upon the plaintiff; but that for the wrongful and fraudulent purpose of concealing the agreement from strangers, the "defendant requested the plaintiff that the contract should not be reduced to writing, and signed by the defendant." What power or right had the plaintiff "to have the contract reduced to writing and signed by the defendant," that he should be requested by defendant not to do so? And how is it, that the plaintiff can predicate a right of action for a fraud not practiced upon him, but upon parties in nowise connected with the trans-

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action, and for which they have neither complained, nor authorized the plaintiff to complain? Nor does the reply show any damage sustained by the plaintiff, nor by the parties from whom the alleged fraudulent concealment was made. The reply is no answer to the statute of frauds. Our own opinion of its character is most candidly expressed in our second special cause of demurrer, viz., that it is merely an attempted slander of the defendant, and that under cover of a regular pleading in Court.

We understand the principle to be, that if, by the express or specific agreement of the parties, or if it appear to have been understood by the parties, that the contract would not be performed within a year from the time of making the agreement, then the contract is void, as being within the prohibition of the statute of frauds.

The plaintiff's counsel have assumed the law to be, that it must be expressly stipulated in the contract, that it is not to be performed within a year. To sustain this position they refer to the dictum of the judge, in *Wiggins v. Keizer*, 6 Ind. R. 254. The point decided there was, that a promise to pay for the future support of a child, is not within the statute of frauds; because it might, or might not, upon a contingency, be performed within a year; and the Court refers to *Fenton v. Emblers*, 3 Burr. 1278; *Moore v. Fox*, 10 Johns. 244. It has been held by several authorities, that the promise to support a child, is not within the statute of frauds. The decision is right; but the language of Judge GOOKINS, in *Wiggins v. Keizer*, is not sustained by the weight of authority. In *Moore v. Fox*, 10 Johns. 244, the Court say: "There must be an express and specific agreement not to be performed within the space of a year," &c. But they do not say, the express stipulation of the parties must be, not to perform the agreement within the year. They held the contract valid, for it did not appear but that it was to be performed within a year; and the presumption was, that it would be performed in a half year."

In *Boydell v. Drummond*, 11 East. 142, it appeared that one party to the contract was to publish and deliver certain large prints from scenes in *Shakspeare's* plays, two to be delivered at the time of subscribing, and the others, at least one annually, after delivery of the first. The Court held, "that if it appears to have been the understanding of the parties to a contract, at the time, that it was not to be completed within a year, though it might, and was in fact in part performed within that time, it is within the fourth clause of the statute of frauds (29 Car. II., c. 3), and cannot be enforced unless in writing." In that case, the attorney general and other counsel had called the attention of the judges to the very case cited by this Court (*Fenton v. Emblers*, *supra*). And BAYLEY, J., with that case before him, said: "The cases have decided that in order to bring a contract within this branch of the statute, it must either have been expressly stipulated, or it must appear to have been the understanding of the parties, that it was not to be performed within a year. That does appear in the present case; and I cannot say that a contract is performed, when a great part remains unperformed; or, in other words, that part performance is performance."

The case of *Peters v. Westborough*, 19 Pick. 364, was a contract like the case in 6 Ind. R., for the support of a person, and was held not within the statute, because its performance depended upon a contingency, the death of the party; and WILDE, J., after reviewing the cases, including the case in 3 Burr., *supra*, and also in 11 East, *supra*, said: "From these authorities it appears to be set-

ted, that in order to bring a parol agreement within the statute of frauds, it must either have been expressly stipulated by the parties, or it must have been so understood by them, that the agreement was not to be performed within a year." May Term, 1859.

In the case of *Herrin v. Butters*, 20 Maine R. 119, the Court say:

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"Where, by the terms of a contract, the time of its performance was to be extended beyond a year, it is within the statute of frauds, though a part of it was, by the agreement, to be performed within a year.

"To bring a case within the statute of frauds, it must have been expressly stipulated by the parties, or it must, upon a reasonable construction of their contract, appear to have been understood by them, that the contract was not to be performed within a year."

At p. 122, WHITMAN, C. J., said: "It is urged that the defendant might have cleared up the land and have seeded it down in one year, and thereby have performed his contract. This may have been within the range of possibility, but whether so or not, must depend upon a number of facts, of which the Court are uninformed. This, however, is not a legitimate inquiry, under this contract. We are not to inquire what, by possibility, the defendant might have done, by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties, that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other, and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to avail himself of the consideration for his engagement, except by a receipt of the annual profits of the land as they might accrue for the term of three years. But whether this be so or not, it is impossible to doubt that the parties to the contract perfectly well understood and contemplated that it was to extend into the third year for its performance, both on the part of the defendant and plaintiff. Its terms most clearly indicate as much, and by them it must be interpreted."

In the case of *Moore v. Fox*, 10 Johns. 244, the Court say: "To bring the case within the statute, it must appear to be an express and specific agreement that the contract is not to be performed within one year,"—and cite the case of *Fenton v. Emblers*, 3 Burr., *supra*, where the same language is used by the Court. But in the case of *Boydell v. Drummond*, 11 East, *supra*, in which there was no express or specific agreement that the contract should not be performed within a year, the Court say that, "the whole scope of the undertaking shows that it was not to be performed within a year, and was, therefore, within the statute." This seems to show very clearly what is to be understood by an express or specific agreement, that a contract is not to be performed within a year. In the case of *Peters v. Westborough*, 19 Pick. 364, Mr. Justice WILDS, in delivering the opinion of the Court, says: "It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year." But who

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can doubt what the express and specific understanding of the parties in the case at bar was? and that it was not to be performed within one year? or, at any rate, that it appears to have been so understood by them?

In *Bull v. McCrea*, 8 B. Mon. 422, Chief Justice MARSHALL, in delivering the opinion of the Court, holds the following language: "We cannot, however, on the face of the declaration, say that the promise to support the plaintiff during her life, was necessarily one which was not to be performed within a year, or that in the contemplation and by the express intention of the parties, it was not to be performed completely within that period." Here the doctrine for which we contend is recognized, that the time within which the parties contemplate and intend the contract shall be performed, must be regarded in determining whether the contract is, or is not, within the statute of frauds.

In *Hinkley v. Southgate*, 11 Verm. R. 429, REDFIELD, J., in the opinion, says: "It is, indeed, not true, that every contract which shall happen not to be performed within the year from the making thereof, is within the statute. If the time of the performance depend upon a contingency, which may reasonably be expected to happen within the year, the contract is not required to be in writing. If the contract be to pay so much money on the return of a ship, which ship happened to return within two years, the case was held not within the statute. *Anonymous*, 1 Salk. 280."

In *Fenton v. Emblers*, 3 Burr. 1278, DENISON, J., says: "The statute only extends to those cases which are 'specifically agreed not to be performed within the year.' It is doubtless true, that the statute does not extend to any case where the time of performance is uncertain, but is expected to come, or may probably come, within one year. In such a case, the parties might be said to act in good faith, in relation to the requisites of the statute, in not reducing the contract to writing. But where the contract is not expected to be performed within the year, but depends upon a contingency, which may, by mere possibility, occur within the year, it would seem but a reasonable strictness of construction to require the contract to be reduced to writing." Such was, in effect, the case of *Boydell v. Drummond*, 11 East, 142.

In 2 Parsons on Cont., 2d ed., p. 316, note (y), the author reviews the cases which have arisen upon this clause of the statute of frauds. We offer no apology for citing this work, though merely a text-book, because the author has a reputation second to few other living commentators.

The cases are divided by the author into three classes:

"1st. Where, by the express agreement of the parties, the performance of the contract is not to be completed within the year." This he holds as clearly within the statute.

"2d. Where it is evident, from the subject-matter of the contract, that the parties had in contemplation a longer period than one year as the time for its performance.

"3d. Where the time for the performance of the contract is made to depend upon some contingency, which may or may not happen within one year." Which latter is held not to be within the statute.

He says, in regard to the second class (on pp. 317, 318), that of "those cases where it is evident from the subject-matter of the contract, that the parties had in contemplation a longer period than one year as the time for its performance, although there is no express agreement to that effect, there has been more doubt, but it is now settled that they are within the statute."

We think there can be no question as to the correctness of the above conclusions, after a careful and critical review of the authorities. Nor do they conflict with the principle upon which the case in 6 Ind. R. was decided; that case clearly falling within the third division.

The Court will observe, that in *Herrin v. Butters*, 20 Maine R. *ante*, the learned judge has inadvertently cited the case of *Moore v. Fox*, 10 Johns. 243 (referred to in *Wiggins v. Keizer*, 6 Ind. R. 252), as using the following language: "To bring the case within the statute, it must appear to be an express and specific agreement that the contract is not to be performed within one year;" while the language used in that case is the following: "There must be an express and specific agreement not to be performed within the space of one year." The words, "that the contract is," are not in the *New York* decision; and we think they are a material interpolation, entirely changing the sense, which seems to have been carried into the citation of the same case in 6 Ind. R., *ante*.

In *Moore v. Fox*, the Court say: "The presumption was that the promise was to be performed half yearly." Is this case to be relied on, when the Courts of the same state have intimated that the contingency referred to is within the statute? The very cases in *Johnson* and in *Burrows*, as we have shown, have been commented upon and explained repeatedly, to mean that the time contemplated and intended for the performance of the contract, must determine the contract to be within or not within the statute.

What then, in the contemplation and intention of the parties, was the time fixed for the complete and full performance of this contract? By the contract between the plaintiff, *Lawrence M. Vance*, and the *Indianapolis and Cincinnati Railroad Company*, made *January 31, 1852*, it was agreed that the work should be completed by the 1st of *October, 1853*; and that within ten days after notice of completion, the bonds were all to be delivered to the plaintiff and *Vance*. That contract is referred to in the contract upon which this suit is founded, and made a part of it. The parties, then, had a period of twenty months for the completion of the railroad and delivery of the bonds. The contract sued on, was made *June 15, 1852*; about fifteen months and a half before the time limited for the completion of the road. It is a matter of public notoriety, and a part of the current history of the times, that railroad corporations make their contracts with the view of accomplishing a completion of their roads at the earliest practicable moment; and it is equally notorious, that no western railroad was ever yet completed within the time contracted for. The parties, then, with the railroad contract before them, which fixed the time for the completion of the road and the receiving of the bonds, which could not be sold till long after the lapse of a year from the time of the making of this contract, made the agreement regarding the disposition of those bonds. Can the Court say that it was not the intention and expectation of the parties, that the contract should extend beyond one year? Or can it assume that a contingency existed, by which the contract could be performed in less than the time fixed?

Webster defines "contingent" to be "a fortuitous event—that which comes without our design, or foresight, or expectation." Contingency—"to happen to," "to fall to."

Browne on the Statute of Frauds, § 283, says—"Physical possibility is not what is meant, when it is said that if the verbal contract may be performed within the year, it is binding."

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If this contract could be completed within the year, it would not be by the happening of a fortuitous event, or without design, but by design and the labor and skill of the contractors. Its completion did not depend upon a contingency; and the parties have shown their intention and expectation, and have expressed their judgment, as to the time required to complete the contract. On this point, we will refer again to the opinion of the Court, in *Herrin v. Butters*, 20 Maine R. 119. WHITMAN, Chief Justice, said: "It is urged that the defendant might have cleared up the land and have seeded it down in one year, and thereby have performed his contract. This may have been within the range of possibility, but whether so or not, must depend upon a number of facts of which the Court are uninformed. This, however, is not a legitimate inquiry under this contract. We are not to inquire what, by possibility, the defendant might have done, by way of fulfilling his contract. We must look to the contract itself and see what he was bound to do, and what, according to the terms of the contract, it was the understanding that he should do." The plaintiff in this suit "was bound" to complete the railroad contract by the 1st of *October*, 1853; and was to receive the bonds within ten days afterwards; and this was understood by the contract of the present parties; and as the bonds were not to be delivered to the plaintiff until after completion, the parties could not intend nor expect to claim the benefits of this contract until after the full completion of the railroad contract. If, then, the intention and understanding of the parties is to govern, the contract was not to be performed within the year.

But it is not simply upon the intention of the parties that we rely. We have pleaded the agreement to be an "express and specific contract, not to be performed within the year." We have averred that by the terms and stipulations of the railroad contract, as well as by the terms and stipulations and recitals of the contract upon which the suit is brought, "the said plaintiff and said Vance bound and obliged themselves to hold the said bonds, and to keep them out of the money market, and not to sell nor finally dispose of them for the whole period of, and until the expiration of sixteen months from the 1st day of *April*, 1852." The contract was for the equal division of advance or loss on the final disposal of said bonds. Then, the contract could not be performed by the express and specific agreement of the parties, until after the 1st of *August*, 1853, more than a year from the date of the contract.

The plaintiff urged, that as the railroad company reserved the right to receive back from said Vance and Wilson, the whole or any part of said bonds, by paying 85 cents for them, any time within said sixteen months, or by giving stock for them at par, the reservation takes the contract out of the statute. But this receiving them back, was evidently not the "final disposal" on which a dividend was to be made; for the parties were bound not to make such "final disposal" or sale of them in the money market during such period, unless by the mutual consent of all the parties. Evidently, the final disposal contemplated was the sale in the money market, after the time limited had expired. The parties contracted not to finally dispose of them for sixteen months, and then agreed to divide the advance or loss on such final disposal. The right of the railroad company to receive back the bonds, and pay off the contractors in money or stock, would have simply terminated the subsequent contract, and not have performed it. But the contract is still more explicit as to the meaning of the term "final disposal." The railroad company had the right to re-

ceive back the bonds without the consent of the contractors, *Vance* and *Wilson*, and without the consent of the defendant; but the contract says expressly, that the final disposal contemplated before the adjustment of profit or loss, should only be made on the mutual, concurrent disposal of said *Vance*, *Wilson*, *Hervey Bates*, and the defendant. Clearly, then, a reception back by the railroad company, of these bonds, without regard to the consent of the four parties above mentioned, was not the final disposal contemplated; and the possibility that the company might thus terminate the contract without regard to the wishes of the parties, does not take the case out of the statute. In the case of *Burch v. The Earl of Liverpool*, 9 Barn. and Cress. 392, it was held, that a contract whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time within that period, upon the payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the statute of frauds, and, therefore, must be signed by the party to be charged therewith. BAYLEY, J., says: "Assuming that the custom proved is to be considered as part of the contract, still the contract was in its terms an agreement for five years, determinable by the parties within that period. It was, in the very terms of it, an agreement not to be performed within a year."

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In the case of *Harris v. Porter*, 2 Harring. 27, the Court held that, "A contract which, by its terms, is to continue longer than a year, is within the statute of frauds, and must be proved by writing, although it may possibly be put an end to within the year." That was an action for the violation of a contract in relation to carrying the mail.

The defendant had a contract with the Postmaster General to carry the mail from *Newcastle* to *Georgetown*, from *January 1, 1832* to *December 31, 1835*. The plaintiff took a sub-contract to carry it a part of this distance, from *Camden* to *Milford*, from *April 1, 1832*, for the residue of *Porter's* term. On the 1st of *October, 1832*, the defendant dismissed *Harris*, and himself put on stages for the whole route. The agreement between them was merely verbal. The defendant moved a non-suit, on the ground that the contract was within the statute of frauds. It was answered by plaintiff's counsel, "That the contract between *Porter* and the Postmaster General, reserved to the latter the power to alter the route, and thus put an end to it at any time whatever; it might, therefore, be terminated within the year; and did not necessarily reach beyond it. Such a contract does not come within the act, which was made to meet agreements the performance of which was necessarily to be postponed beyond the year. 1 Com. on Cont. 79, &c.—3 Burr. 1278. Contracts depending on a contingency are not within the statute. If the agreement may be performed within the year, it is not within the statute. 10 Johns. 254."

But the Court said: "This was a contract which could not possibly be performed within one year; by its terms, it was to continue four years. And though it might be annulled or put an end to by the Postmaster General, within the year, it still falls within the act, as an agreement which, according to its terms, is not to be performed within the space of one year."

We think the decision is applicable to the case before the Court. The defendant was to be liable, by the terms of the contract, for the loss upon the final disposal of the bonds, which disposal was to be made only on the concurrent disposal of *Bates*, *Ray*, *Wilson*, and *Vance*. They were to be held some

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fifteen months before they could be thus finally disposed of; and the fact that the railroad company could redeem them within that time, against the will of all parties, and thus terminate the contract, did not render the contract capable of full performance within the year.

But we have also alleged "that the contract could not be performed within the year." This would raise an issue of fact, if the question is not to be determined alone by the agreement. In the case, cited above, of *Burch v. The Earl of Liverpool*, 9 Barn. and Cress. 392, the Court received evidence of the custom of the trade, to determine the contract of the parties. In *Clark v. Pendleton*, 20 Conn. R. 495, the Court say: "It is unnecessary for us to determine what would be the effect of proof that the event upon which the performance of a verbal contract depended, could not by possibility take place within a year from the making thereof, when it did not appear from the contract itself that it was not to be performed within that time, because there was no claim in the present case, that raised that point."

We do not know that any Court has settled this point. We do not press it, because we believe this case to be one where, by the terms of the contract, and by the intention and expectation of the parties, its performance was to extend beyond the year. It has been so held, after a most careful examination by his Honor Judge MAJOR, and we cannot doubt that your Honors will view the contract in the same light. But if not, we submit that our plea puts the possibility of performance in issue, and to sustain the demurrer, the Court must hold that evidence outside of the contract, going to show that from the situation of the parties, and the subject-matter of the contract, or other circumstances, it could not be performed within the year, must be excluded.

Upon the petition for a rehearing, Messrs. *Morrison, Ray, and O'Neal* submitted the following brief:

The petitioner, represented now by an array of distinguished names, other than those, no less distinguished, who fought the case to what was, until a few days ago, understood by us to be a final decision, has presented, and earnestly pressed upon the special attention of your Honors, a proposition which they insist should determine the case in their favor, to-wit, that the contract sued upon was "so far executed as to take it out of the statute."

While we emphatically deny that assumption, we concede the following propositions:

1. "Where the contract has been, in fact, completely executed on both sides, the rights, duties, and obligations of the parties, resulting from such performance, stand unaffected by the statute." Browne on Stat. of Frauds, p. 118, § 116.

2. "Where a verbal contract is completely executed by one party, the consideration can be recovered from the other, notwithstanding the statute of frauds." *Id.*, p. 119, § 117.

Whilst, however, we make these concessions, there are other propositions equally plain and authoritative, that, when applied to the case, must overrule the motion for a rehearing.

In discussing the assumption of the petitioner, we feel it to be almost impossible to do so without a repetition, in our own way, of many things that have been much better said in the unanswerable opinion already delivered; and our apology for saying anything further on the subject is, that we do so

merely in compliance with the request of our client; for we have the most implicit faith in the perfect correctness of the decision already pronounced, which, and without any flattery we say it, was, at the time, received by the bar with unqualified approbation.

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As preliminary to the principal question presented for a rehearing, we submit that the complaint is bad, because it does not aver and show "such acts of part execution, or other equitable circumstances as would justify the Court in enforcing it." *Browne on Stat. of Frauds*, p. 484, § 511. We suppose that, under our present practice, law and equity distinctions being abolished, and all material facts being required to be stated, both in the complaint and answer, the complaint should show, either that the contract sued on was in writing, or "such acts of part execution, or other equitable circumstances as would justify the Court in enforcing it." It is not alleged that the contract was in writing; and we insist there are no proper averments showing any such act of part execution, or other equitable circumstance, as the rule requires.

We demurred to the complaint. Our demurrer was overruled, and we excepted. We then answered. *Wilson* demurred to the answer. This demurrer reached back to the complaint; and if that was bad, the decision was right in our favor, even if the answer was bad, which, however, we do not admit, and which answer this Court have already adjudged to be sufficient.

There is no act or equitable circumstance alleged in the complaint that, according to settled authorities, will take the case out of the statute.

Maddocks, in his *Treatise on Chancery*, vol. 1, p. 301, says: "If, therefore, it be clearly shown what the agreement was, and that it has been partly performed—that is, that an act has been done, not a mere voluntary act, or merely introductory or ancillary to the agreement, but a part execution of the substance of the agreement, and which would not have been done unless on account of the agreement; an act, in short, unequivocally referring to, and resulting from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement; in such case, the agreement will be decreed to be specifically performed." See, also, 2 Br. Ch. Cases, 140; 1 *id.* 412; 3 Atk. 4; 2 Anstr. 424; Ambl. 586; 1 Sch. and Lef. 41; 14 Ves. 386.

The rule is quoted and acted upon in *Caldwell v. Carrington's Heirs*, 9 Pet. 86.

Again, in *Phillips v. Thompson*, 1 Johns. Ch. 132, Chancellor KENT uses the following language: "It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill." "Such an act," to use Lord HARDWICKE's words, "as could be done with no other view or design than to perform the agreement." See, also, 1 Md. Ch. Dec. 345; 4 Md. R. 459; 1 Hare, 26; *Frame v. Dawson*, 14 Ves. 386; 7 *id.* 341; 2 Sch. and Lef. 1; 2 Cox, 271; 1 Coll. Ch. 624; 1 Swanst. 172; 2 Dru. and War. 349; 6 Ves, 12; 6 Barb. (N. Y.) 98; 15 Conn. R. 406; 19 *id.* 74; 19 Penn. R. (7 Harr.) 461; 3 *id.* 332; 7 Barr. (Penn.) 91; 11 Gill and Johns. 314; 1 Md. Ch. 244; 8 Gill, 337; 9 *id.* 32; 2 McCord Ch. (S. C.) 274; 2 Overton, 192; 11 Ohio R. 265; 3 Gill and Johns. 127.

Now, what acts or circumstances are shown in the complaint?

It is alleged that the plaintiff and one *Vance* made an agreement with a railroad company to furnish materials, and do a large amount of work, for

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which they were to receive, and did receive, a large amount of bonds, to-wit, \$50,000 dollars. The complaint then proceeds as follows: "The plaintiff farther says, that, in order to raise the money first aforesaid, it became necessary to borrow the same by the execution of commercial paper, from time to time, as the same might be needed, with good indorsers, in view of which necessity the said *Vance* procured one *Hervey Bates* as his indorser, acceptor, and drawer on said commercial paper, on terms then agreed upon between them; and the plaintiff, in order to procure an acceptor, drawer, and indorser, also, as aforesaid, then and there entered into the following agreement with the defendant: The plaintiff then and there promised the defendant, that if the defendant would draw, accept, and indorse said commercial paper, as the same might be, from time to time, needed, along with said *Bates*, the plaintiff would pay to said defendant one-half of the amount which the plaintiff should realize on said bonds, over and above 75 cents on the dollar of said bonds—provided, that if on said bonds he should not realize 75 cents on the dollar on disposal of them, the defendant should pay to the plaintiff one-half the loss sustained by the plaintiff, by reason of such disposal of them under 75 cents on the dollar; and defendant, then and there, in consideration of said promise by the plaintiff, promised," &c.

The complaint proceeds to allege that the defendant did draw, indorse, and accept as aforesaid, and that a loss did occur. The distinguished counsel who controlled this case until it was decided, failed to show any act of part performance by the plaintiff, to take it out of the statute. This learned Court failed to discover any such act; and if any such act has been pleaded, the present counsel are entitled to the credit of its discovery. The new discovery is, that the plaintiff and *Vance* did perform the work they had contracted with the railroad company to perform. That may or may not be true, though it is not so alleged in the complaint. Indeed, the complaint pleads the contract with the railroad company, and the delivery of the bonds to *Wilson* and *Vance*, as if it preceded the contract with the defendant. But, at all events, the complaint shows, that by the contract with the railroad company, *Wilson* and *Vance* were jointly obliged to perform the work and receive the bonds; and the fact that they did so, in compliance with their own solemn obligations to the railroad company, does not fill the requirement "that the act must be one which would not have been done, unless on account of this contract" between *Wilson* and defendant. Is this such an act, to use Lord *HARDWICK*'s words, "as could be done with no other view or design than to perform this agreement?" In *Johnston v. Glancy*, 4 Blackf. 98, the Court say: "But even these acts of part performance must be done with a direct view of the agreement being performed, and be such acts as could be done with no other view, or the agreement will not be taken out of the statute."

"But an act which, though done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part performance to take the case out of the statute of frauds." Browne on Stat. of Frauds, § 455. The complaint itself shows that the act relied upon was done in pursuance of a contract between other parties. It certainly can be explained without presuming a contract between *Wilson* and defendant.

Justice *STORY* says: "In order to make the acts such as a Court of equity will deem part performance of an agreement within the statute, it is essential

that they should clearly appear to be done solely with a view to the agreement being performed. For if they are acts that might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement." 2 Story's Eq. Juris., § 762. Apply this rule to the act of performance claimed by the plaintiff.

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The case of *Jacobs v. The Petersburg, &c., Railroad Co.*, 8 Cash. 223, was one where the owner of land, through which a railroad corporation were authorized to make their road, gave them a bond to convey to them by a certain day, on payment of a specified sum of money, so much of his land as should be taken by them by authority of law for the purposes of their road; and the corporation, within the time allowed by law, entered upon and took the land for the purposes of their road; but on the owner's tendering them, on the day named in the bond, a deed of the land so taken, the company refused to pay him the stipulated sum of money. It was *held*, "that the agreement, not having been signed by the corporation, could not be specifically enforced against the corporation in equity." The Court say: "In the first place, it does not appear that the defendants took possession of the land under the contract. They had the right, under their acts of incorporation, and the general statutes of the commonwealth, to enter upon the land of the plaintiff, and construct their road over it, without any contract, and even against the consent of the owner. For aught that appears in this case, all the acts of the defendants, relied upon as showing part performance of the contract, were done under the rights and powers conferred on them by statute, and not in pursuance of the contract. If the acts done are equivocal in their nature, or susceptible of a double interpretation, a Court of equity will not interfere on the ground of part performance."

In the case cited, the railroad company could enter upon the land either under their charter or under the contract. But in the case now before the Court, the plaintiff was bound, by a contract with another party, as stated in his complaint, to perform this very work, and receive these bonds in payment for that work. It cannot, then, be said, in the language of the authority in 4 Blackf. *supra*, that the work was done by the plaintiff "with a direct view of this agreement (with defendant) being performed, and was such an act as could be done with no other view." The complaint, in stating the contract between the plaintiff and Vance, and the railroad company, have precluded any presumption of the work being performed in execution of the contract with the defendant, even if presumption could be regarded in such a case. But the fact that the performance of the work and receiving of the bonds were by Wilson and Vance jointly, fixes the fact, beyond all question, that the performance alleged in the argument of the counsel, was under the joint contract of Wilson and Vance with the railroad company, and not under the separate contract between Wilson and the defendant. The work done was not performed by Wilson, but by the firm of Wilson and Vance. This defendant had no connection with that firm, nor with the contract between them and the railroad company, by which they were required to perform that work and receive the bonds.

This Court, in discussing the point of performance, use the following language:

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"The first proposition, we think, is not true in point of fact. We do not regard the contract as being executed, but as executory in its character. The promises were mutual, and dependent one upon the other for a consideration. The plaintiff, in consideration of the defendant's promise, promised the defendant one-half of what he should realize on the bonds over 75 cents on the dollar; and the defendant, in consideration of the plaintiff's promise, promised to become drawer, acceptor, indorser, &c., for the plaintiff, and to make up to the plaintiff one-half of the loss on the bonds, should they not bring the 75 cents on the dollar. The contract, when made, was purely executory. No consideration passed from one to the other. The consideration of the promise of each was the promise of the other."

This is certainly the true view of the contract; and in this view, *Wilson* has done nothing; and the assumption that *Ray* could have enforced the contract against *Wilson*, can only be true because *Ray* had, in part, performed; and the argument that, therefore, *Wilson* can sustain the action against *Ray*, proceeds upon the ground that part performance by defendant takes the case out of the statute, which is not the law. The authorities all concur in establishing the position that the part performance which would entitle a party to enforce such a contract, must proceed from himself. See *Browne on Stat. of Frauds*, § 453, and authorities cited; *Rathbone v. Rathbone*, 6 Barb. 98.

Again, *Story*, in his *Equity Jurisprudence*, vol. 2, § 761, says: "But a more general ground, and that which ought to be the governing rule in cases of this sort, is, that nothing is to be considered part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed." Can it be insisted that *Wilson*, in fulfilling the terms of his joint contract with *Vance* and the railroad company, has done any act which he could avoid doing under that contract? And could the defendant defraud him by inducing him to do an act that the law would have compelled him to perform? This answers the argument of the petition, even if we admit that *Wilson* had performed the work under his contract with the defendant.

But if the petitioner could be permitted to contradict his complaint, and insist, as he attempts to do, that the defendant's promise to be responsible for loss, was not in consideration of the plaintiff's promise to pay him one-half of the profit on the bonds as alleged in the complaint, but was in consideration of performing the work for the railroad company, and that the work had been performed, still it would not save this case from the statute. The rule of law is as follows (we quote from 1 *Smith's Lead. Cas.*, p. 437): "But it has been generally held in this country, that as the statute was meant to provide against the danger of allowing contracts to be proved by parol evidence, at periods remote from those at which they were made, it applies to all cases where the obligation or duty sought to be enforced could not have been fulfilled within a year from its date; and that an oral promise for the payment of money, or the performance of any other act, at a greater distance of time than a year, is consequently invalid, whether made upon an executed or executory consideration." See *Cabot v. Haskins*, 3 Pick. 83; *Holbrook v. Armstrong*, 1 Fair. 30; *Lockwood v. Barnes*, 3 Hill, 128. In *Boadwell v. Getmann*, 3 Denio, 87, it was also held that unless the agreement can be completely executed on both sides within the year, it must be in writing.

This Court has already determined, and the counsel admit, that the contract could not be performed by *Ray* within the year. The bonds could not have been sold, and the profit and loss paid within the year.

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But we insist that the acts which the petitioner claims to have performed, even if performed, and if that performance had been under his contract with the defendant, would not be such acts as to take the case out of the statute; for the reason that he can be compensated for those acts in damages. In the case of *Frost v. Beekman*, 1 Johns. Ch. 288, Chancellor KENT holds the rule to be, that when damages at law will afford the party compensation for his labor, or part performance, he must be content with that remedy. And he holds that, although the plaintiff in that case had made improvements on the land purchased, still he could be paid for those improvements, and the contract could not be enforced. He refers to the fact that fluctuating decisions on this point had been made by the Courts, but states this as the true rule.

In *Frame v. Dawson*, 14 Ves. 387, it is held that the act of a tenant rebuilding a party wall, is not sufficient to take the case out of the statute, as it admits of compensation. In *Armstrong v. Kattenhorn*, 11 Ohio R. 271; *Eckert v. Eckert*, 3 Penn. R. 332; 3 Swanst. 437; and also in Browne on Stat. of Frauds, § 452, the same rule is recognized.

STORY, J., quotes the rule, and states the reason why, in certain cases where the plaintiff had entered upon land purchased under a parol contract, and had made improvements, the acts had been held sufficient to take the case out of the statute. In such cases, the reason was, that the party performing the act would be liable to a suit for the very act, and should be allowed to interpose the defense of the verbal contract authorizing the act; "and if admissible for such a purpose, there seems no reason why it should not be admissible throughout." Story's Eq. Juris., § 761.

Now, if *Wilson* performed the labor of building the railroad, and received therefor the bonds, under his contract with the defendant, and not under his contract with the railroad company, he has the Courts of law open to him, and he can be paid for the labor. He can be compensated for all the work done, without having the statute of frauds violated for his relief. But we insist there can be no question that *Wilson* and *Vance* performed the work under their contract with the railroad company.

But part performance, when relied upon to take a case out of the statute, must be pleaded. See Browne on Stat. of Frauds, § 507. It has not been done either in the complaint or reply, and, of course, cannot be brought before the Court.

It therefore appears clearly that the act of part performance relied upon by the plaintiff, does not fulfill a single requisite of the law, and that the able opinion of this Court, delivered in this case, must be sustained, and a new hearing refused.

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The decision of this case cannot be stated more briefly than it is stated in the opinion.

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APPEAL from the *Franklin* Court of Common Pleas.

PERKINS, J.—This is a suit by *Peter Hetrick* against *Eli Hetrick*. Judgment below for the plaintiff.

The facts of the case are substantially these: In *August*, 1851, *Mary Hetrick*, then a *feme sole*, executed to *Peter Hetrick* a note for 500 dollars. In *May*, 1852, she married *Eli Hetrick*, the defendant. In the spring of 1854 she died, leaving the 500 dollar note unpaid. In 1858, the payee of the note commenced suit to recover the amount of it from *Eli Hetrick*, *Mary's* surviving husband. Said *Eli* received about 800 dollars by his said wife, *Mary*.

If this case was to be governed by the R. S. of 1852, there would be no difficulty in deciding it. Those statutes provide that in all marriages hereafter contracted, the husband shall be liable for the debts and liabilities of the wife contracted before marriage, to the extent of the personal property he may receive with or through her, or derive from the sale or rent of her lands, and no farther. Such liability of the husband shall not be extinguished by the death of the wife. 1 R. S. p. 320.

But this case is not to be controlled by the statute quoted. The statute applies, by its terms, only to cases where the marriage occurred after its passage. The case under consideration is to be determined by the principles of the common law. By that law, the husband was liable during coverture for the debts of his wife, *dum sola*; but his liability ceased when the coverture ceased. 2 Kent's Comm. 143.

Nor did the fact that the husband received property by his wife alter the case; even the very property for the purchase of which the debt was contracted. Kent, *supra*.

* A petition for a rehearing of this case was filed on the 19th of *July*, and overruled on the 7th of *September*.

The decision of this case below seems to have been influenced by the fact that our statute has declared that the separate property of the wife shall remain hers, free from the control of her husband, and from liability to his debts. This provision has no effect upon a case like the present. It has changed the common law to this extent only. By the common law, the husband could appropriate the personal property of the wife, where it could be done without going into chancery, without her consent; by the statute, he can only do it with her consent; and with her consent, he can do it. The wife can bestow, by an executed gift, any property she may possess, upon her husband, if she pleases, as may the husband upon the wife. And the provision of the statute we are now considering has not increased the liability of the husband to the creditors of the wife. If the husband receives the separate property of the wife by her free gift or consent, and without any condition, he does not, by the section of the statute under consideration, hold it as a trustee for her, and liable to be charged, as a trustee, with the amount after her death. *Johnson v. Rockwell*, 12 Ind. R. 76.—*McCarty v. Mewhinney*, 8 *id.* 513. For a case where he was held chargeable as a trustee, see *Keister v. Howe*, 3 Ind. R. 268.

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Nor would a simple voluntary promise, by the husband after the death of his wife, to pay her debts, contracted *dum sola*, render him legally liable. The promise would be without consideration. Where he had received property from his wife, at or during coverture, there might be a moral obligation upon him to pay such debts; but a moral obligation, simply, will not support such a promise. The obligation must be a legal one. Ind. Dig., p. 13, § 7.

If such a promise had been made to the wife, or to the creditor of the wife, as the condition upon which the wife consented to the reception by the husband of her separate estate, he might, we presume, be liable upon it. Ind. Dig., p. 67, § 6.

To prevent misapprehension, we again remark, that if the marriage in question had been celebrated after the revised statutes of 1852 came into force, the surviving hus-

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band would have been liable to pay the note, because he had received property of his wife to the amount of it. And the fact that he received it by way of gift, or with the consent of his wife, would not relieve him from the liability. It is only by such modes that the husband can, under the statute, possess himself of the separate property of his wife.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. Holland and *C. C. Binkley*, for the appellant (1).

H. C. Newcomb and *J. S. Tarkington*, for the appellee (2).

(1) Counsel for the appellant cited *Reeve's Dom. Rel.* 67; 2 *Kent's Comm.* 143, 144; *Heard v. Stanford*, 3 *P. W'ms*, 409, cases temp. Talb.; *The Earl of Thomond v. The Earl of Suffolk*, 1 *id.* 469.

(2) Counsel for the appellee cited 3 *J. J. Marsh.* 227; 2 *Story's Eq.*, §§ 1217, 1380; 5 *B. Mon.* 118; *Resor v. Resor*, 9 *Ind. R.* 347; 5 *id.* 407; 4 *Kent's Comm.*, * 152, 154; 3 *B. Mon.* 348; *Hov. on Fraud*, * 470, 471; *Medler v. Hiatt*, 8 *Ind. R.* 171. In their petition for a rehearing, they cited, also, 1 *Blackf.* 246; 2 *Story's Eq.*, §§ 789, 790 to 793, 1216 to 1219; 3 *Sug. on Vend.* * 182, 183, 184.

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A change of venue must, in civil actions, be granted upon a proper application. The Court has no discretion.

As a general rule, an application for a change of venue must be made and supported by the affidavit of the party, in person. The affidavit of his attorney will not compel the change.

There are exceptions to this rule; as, in suits by or against corporations.

It is within the sound, legal discretion of the Court to grant or refuse a change of venue upon application and affidavit by a person not a party to the record.

A second affidavit for a continuance, at the same term, for the same general reason, namely, the absence of witnesses—the first having been overruled—was held bad, because it did not show a reasonable excuse for the failure to embrace all the reasons for the continuance in the first application.

* The petition for a rehearing of this case was filed on the 28th of *July*, and overruled on the 8th of *November*.

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The Court has greater latitude of discretion in passing upon such applications, than in ordinary cases.

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In an action for seduction, the general character for chastity of the person seduced, is in issue, and may be impeached or supported by general evidence; but she cannot be asked whether she had not been previously criminal with other men. But other persons may be called upon to testify as to their own criminal intercourse with her, and the time and place.

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The question of character is involved in the question of the amount of damages; and, therefore, evidence of the character and the acts of the female seduced, is admissible, which would not be proper as to any other witness.

APPEAL from the *Vigo* Circuit Court.

Monday,
May 30.

HANNA, J.—This was an action against *Shattuck*, by *Myers*, for the seduction of his daughter.

Trial; verdict and judgment for the plaintiff for 1,500 dollars.

Several errors are assigned—

First. Upon the ruling of the Court on the motion to change the venue.

It appears by the record, that the defendant was not present at the trial, in person, and that the application for a change, was made and supported by the affidavit of his attorney.

It has been several times decided, that applications in civil actions, for a change of venue, when properly presented, should be granted, and that the granting or withholding thereof, was not within the discretion of the Court. *Witter v. Taylor*, 7 Ind. R. 110.—*Shaw v. Hamilton*, 10 id. 182.

In *Sherry v. Denn*, 8 Blackf. 543, it was held that, under the statute then in force, a stranger to the record could not make the affidavit. The wording of that statute is slightly different from that under which this case was decided. Without doubt, there are cases in which persons other than parties to the record, would have to make the affidavit, if made at all; as in suits by or against corporations, &c. But these cases, in our opinion, are exceptions to the general rule, which is, we think, that the application should be made by the party, and supported by his affidavit. It is, in one sense, a personal privilege a

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party possesses, to be tried by a jury of the vicinage, or to waive the right to be thus tried, by asking a change of venue. 7 Ind. R. 110.

The statute is, that "The Court in term, or the judge in vacation, may change the venue of any civil action, upon the application of either party, made upon affidavit showing," &c.

It would be the duty of the Court, upon a proper case made by the application and affidavit of the party, to grant a change. There would be no discretion. But whilst we say this much, we are inclined to think that in the further consideration of the statute, and the practice that arises under it, we must either admit, under proper limitations and restraints, or entirely exclude, applications in behalf of a party, made by persons not parties to the record. If, in putting a construction upon the statute, it should be determined that no one but the party can make the affidavit, we can perceive that very great injustice might be done to parties who were necessarily absent, or who could not make the affidavit. If we determine that the affidavit of persons other than the party, may be received, then the question arises, what limit is there to the introduction of such affidavits? Shall the affidavit of any one be received, and compel an order by the Court to change the venue? Such a construction as this might, and, we doubt not, would, often lead to a virtual defeat of the ends of justice.

Viewing the whole matter in this light, we are inclined to think that the proper practice is, to leave it in the sound legal discretion of the Court, to grant or refuse the change, upon application, &c., made by one not a party to the record.

We are strengthened in this construction of the statute, by reference to other statutes, to-wit, regulating applications for writs of attachment, *habeas corpus*, *capias*, &c., in each of which the affidavit may be made by the party, his agent, or attorney.

The affidavit in support of the application in the case at bar, having been made by the attorney in the case, not

disclosing any reason for the absence of the defendant, or why he did not make the affidavit, we cannot say that the Court abused that discretion.

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Second. Was it error to refuse a continuance because of the absence of the witnesses named, to-wit, *Wilson, Paddock, and Stewart*. This was the second application, at that term, for a continuance for the same general reason, namely, the absence of witnesses. The first was overruled, whether correctly or not we are not called upon to decide, as no point is made upon that ruling. Rule 28.

Upon these facts a question is raised, as to what the practice should be.

“A motion for a continuance, is an application to the sound, legal discretion of the Court, over which, if improperly used, a superior Court will exercise a control.” *Vanblaricum v. Ward*, 1 Blackf. 50.—*Espy v. The State Bank*, 5 Ind. R. 274.

In an application for a continuance, counter affidavits should not be received. *Hubbard v. The State*, 7 Ind. R. 162. Nor amendments permitted to those filed after a decision of the motion founded thereon. *Driskill v. The State*, *id.* 341.

We are not apprised of any reason why the practice should not be as strict in civil as in criminal cases.

If it is not proper to permit an amendment to an affidavit, after it has been passed upon, we cannot see how such application can be distinguished from one renewed for the same general cause with that overruled; especially where that cause existed at the time of the first application. In the case at bar, the defendant conceived he had a right to a continuance, because of the absence of witnesses. An affidavit was filed as to one, and the motion overruled; but suppose that, instead of the Court taking action upon it, the plaintiff had offered to admit, as true, the matters that it was averred in the affidavit the witness would testify to. This he had a right to do.

What, then, would have been the rights of the defendant? Could he, as a matter of course, have proceeded to file an additional affidavit, stating that other witnesses were

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absent, by whom he could prove other facts, &c., without showing that some excuse existed for not including all the reasons in the first application, that existed at the time of making it?

If the witnesses named in the second affidavit, in the case at bar, had appeared and testified, as it was stated in the affidavit they would, their evidence could have been received but for one purpose, to-wit, in fixing the amount of damages, and not in bar of the action.

Whatever may be the correct general rule, in the instance above suggested, we are of opinion that, in this case, under the circumstances, the second affidavit should have contained a reasonable excuse for the failure of the defendant to avail himself of these causes for a continuance, which existed at the time of his first application, in making that motion. At least, it is manifest to us, that where an application is made, under such circumstances, for a continuance, to obtain evidence of the character indicated, it is but right to allow a greater latitude of discretion in the judge presiding at the trial, in determining upon that point, than in usual and ordinary applications; and, as we cannot perceive any abuse of that legal discretion here indicated, we do not think there was any error in the ruling upon the second affidavit.

Third. Was there error in the rulings of the Court in refusing to admit evidence?

Upon the cross-examination of the leading witness in the case, namely, the daughter of the plaintiff mentioned in the pleadings, she was asked whether, a short time before she had intercourse with the defendant, she had not had intercourse with *Davidson Rainey*, or *Seth Clarke*, or *Benjamin Howell*, or with the schoolmaster, *Kirkland*, or with any other man, shortly before or after such acts with the defendant.

Upon objection made by counsel, the Court ruled that the witness was not compelled to answer the questions.

In answer to questions afterwards put by the plaintiff, she stated that "the defendant was the father of the child; that she never had had connection with her husband,

Clarke, before their marriage, nor with *Howell*, nor with *Rainey*.”

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It will be observed that the answer does not cover all the questions. Nothing is said about *Kirkland*; or, in answer to the general question, as to other persons.

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The point is, therefore, presented, that the ruling of the Court was erroneous, and, because of the limited answer afterwards elicited, was injurious to the defendant.

In 2 Greenl. Ev., § 577, it is said that the general character of the person seduced, for chastity, is considered to be involved in the issue, and may, therefore, be impeached by the defendant by general evidence, and supported by the plaintiff in like manner; but she cannot be asked whether she had not been previously criminal with other men. But other persons may be called to testify as to their own criminal intercourse with her, and the time and place. *Bomfield v. Massey*, 1 Campb. 460.—*Dodd v. Morris*, 3 *id.* 519.

The last cited case, was a suit by a father for the seduction of his daughter. She was introduced by the plaintiff as a witness, and upon her cross-examination she was asked a similar question, as to whether she had had previous intercourse with other men, but, upon objection made, she was not permitted to answer. This is a strong case for the reason, that it was shown by other witnesses that this was the second illegitimate child the female had borne; and yet her father had judgment.

The defendant relies upon the case of *The People v. Abbott*, 19 Wend. 192. That was an indictment for a rape, in which it was determined that, upon the examination of the prosecutrix, it was proper to ask her questions as to her former criminal connection with other men; and it was placed upon the ground that “any fact tending to show that there was not the utmost reluctance and the utmost resistance, is always received.” After examining the question at length, the judge who delivered the opinion of the Court, says: “I have been quite unfortunate, if I have not shown that in this case of rape, the question is very mate-

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rial in examining the probability of assent—the vital inquiry in the case.”

In the case at bar, the question of assent of the female alleged to have been seduced, was not in issue. *McAuley v. Biskhead*, 13 Ired. 28. In the case cited, the plaintiff sued for the seduction of his daughter, &c. The evidence showed that upon a proposition made by the defendant to the female, she at once, without objection, and without being persuaded thereto, consented to improper intimacy. Upon this state of facts, and instructions thereon, the Court say: “The gravamen of the action is, that the defendant had connection with the plaintiff’s daughter, and a member of his household, and, in contemplation of law, his servant, whereby she became pregnant and was delivered of a child, by reason of which he lost her services. The plaintiff having proven these facts, made out his case, and was entitled to damages to some amount.

“Whatever bearing the forward and indelicate conduct of the daughter ought to have had on the question of damages, it certainly ought to have had none on the question of his right of action. In respect to him she had no right to consent, and her act in assenting to, or even in producing, the criminal connection, was a nullity.”

This doctrine appears to be based upon the theory that the female seduced stands as any other witness in the case. Her testimony is not indispensable, for the plaintiff may be able to make out his case without her. In contemplation of law, he recovers but for the loss of her services; though, in practice, juries are permitted to, and usually do, take into consideration the position of the parties in society, their character, and consequently the extent of the humiliation and dishonor that is occasioned to the parent by the act. Therefore, the question of character is involved in the question of the amount of damages; for that reason, evidence of the character and acts of the female seduced, is received, which would not be proper as to any other witness.

Per Curiam.—The judgment is affirmed with 3 per cent. damages and costs. May Term,
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J. P. Usher and *J. W. Gordon*, for the appellant.

R. W. Thompson and *J. P. Baird*, for the appellee.

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v.

REEVES.

COOPER and Another v. REEVES and Others.*

Suit against *A.* and *B.*, partners, upon promissory notes signed by the firm name. Pending the suit, *C.*, on behalf of the plaintiffs, filed an affidavit, alleging that *A.* was justly indebted to the plaintiffs on the notes in suit, giving the dates of the notes, the time for which they were to run, and the amount paid upon them; that the plaintiffs were entitled to recover the balance, for which suit was pending; that *A.* had transferred or conveyed his property subject to execution, by mortgage, to *D.*, and was about to convey the same, with the fraudulent intent to cheat, hinder, and delay his creditors. Upon the filing of this affidavit, &c., a writ of attachment was issued and levied upon the property. *Held*, upon a motion to discharge the attachment, &c., that the affidavit sufficiently conformed to the statute.

A. moved to discharge the attachment for the reasons, that there was property belonging to the firm, subject to execution, sufficient for the payment of the notes; that the property attached was his individual property, first liable for his individual debts, which amounted to 3,000 dollars, due at the commencement of the suit, and more than sufficient to exhaust the property attached; that before the attachment issued, he mortgaged his property to *D.*, in trust, to secure his individual debts, in good faith, with no intent to defraud any creditor, which mortgage was duly recorded, &c., and he denies each and every allegation in the affidavit; all which he is ready to prove, &c. *Held*, that the motion was correctly overruled; that it is only for defects apparent on the face of the proceedings, that such a motion can be maintained.

APPEAL from the *Delaware* Court of Common Pleas. Tuesday,
May 31.

DAVISON, J.—*Mark Reeves & Co.* brought this action against *Charles Cooper* and *Joshua Dodd*, partners, &c., under the firm of *Cooper and Dodd*, upon two promissory notes signed by them, by their firm name. During the pendency of the suit, one *Thomas J. Sample*, on behalf of the plaintiffs, filed an affidavit, alleging that *Cooper* was

* A petition for a rehearing of this case, was filed on the 12th of *July*, and overruled on the 8th of *November*.

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justly indebted to the plaintiffs on the notes in suit; that one of them is dated *August 2*, 1856, and is for the payment of 197 dollars, at six months; and that the other bears date *September 15*, of the same year, and is for the payment of 220 dollars, due six months after date; that upon these notes there was paid, *February 6*, 1857, 100 dollars—*June 25*, 1857, 28 dollars; and that the plaintiffs are entitled to recover the balance, for which suit is now pending. The affidavit further says: "That *Cooper*, one of the defendants, has transferred or conveyed his property subject to execution, by mortgage, to one *Caleb D. Jones*, and is about to convey the same, with the fraudulent intent to cheat, hinder, and delay his creditors."

Upon the filing of this affidavit, the written undertaking required by the statute having been filed, a writ of attachment was issued and levied on *Cooper's* property, which, by virtue of said writ, was retained in the custody of the sheriff.

At the proper time, *Cooper* moved to discharge the attachment, and for restitution of the property, on the ground that the affidavit was defective; but his motion was overruled, and he excepted.

The code provides that, before an attachment issues, the plaintiff, or some one on his behalf, is required to make an affidavit showing—

1. The nature of the claim.
2. That it is just.
3. The amount he believes the plaintiff ought to recover.
4. That there exists some one of the grounds for the attachment—enumerated in a preceding section of the statute. 2 R. S. p. 64, § 159.

The section to which the fourth requirement refers, points out six grounds upon which an attachment may issue. The fifth and sixth alone are applicable to the questions before us—they are as follows:

5th. Where the defendant has sold or conveyed, or otherwise disposed of his property subject to execution, with the fraudulent intent to cheat, hinder, or delay his creditors.

6th. Where he is about to sell, convey, or otherwise dispose of his property subject to execution, with such intent. *Id.*, p. 63, § 156.

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The first, second, and third requirements are plainly stated in the affidavit. It alleges that *Cooper* was justly indebted to the plaintiffs by two notes, stating the amount of each; avers that they are subject to credits which are specifically set forth, and says that the plaintiffs are entitled to recover the balance. Thus far, the affidavit conforms sufficiently with the statute; and, in reference to the fourth requirement, the affidavit, though very informal, avers, substantially, that *Cooper* had conveyed his property subject to execution, with intent to defraud his creditors.

The motion founded on the alleged defects in the affidavit having been disposed of, *Cooper* moved to discharge the attachment for additional reasons, viz., "That there is property belonging to the firm of *Cooper* and *Dodd*, subject to execution, and sufficient for the payment of said notes; that the property attached is the individual property of *Cooper*—first liable for his individual debts, which amount to 3,000 dollars, due at the commencement of this suit, and more than sufficient to exhaust the property attached; that before the attachment issued, he mortgaged his individual property to *Caleb D. Jones*, in trust, to secure his individual debts, in good faith, with no intent to defraud any creditor—which mortgage is duly recorded, &c., and he denies each and every allegation in the affidavit; all which he is ready to prove, &c.

The Court overruled this motion, and we think correctly. It is only for defects apparent on the face of the proceedings, that such a motion can be maintained. There is, indeed, no reason why the averments in the affidavit, in cases of attachment, may not be traversed or avoided by answer, as if they were contained in an original complaint; and it may be, that under issues properly formed, and triable by a jury, the matters stated in the motion would have been available. Such matters, however, cannot be made the subject of a motion to the Court, because they do not appear in the proceedings, and must, to be

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effective, be set up by answer, tendering an issue of fact, proper for the decision of a jury.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

W. March, for the appellants.

T. J. Sample, for the appellees.

KIRK and Wife v. THE FORT WAYNE GASLIGHT COM-
PANY.*

A bond for the assumption and guaranty of payment of a promissory note, implies a debt due the obligee, which the obligor agrees to pay by paying a debt due from the obligee to another.

The bond is an original undertaking, and not merely a contract of indemnity. Where a mortgage was executed by husband and wife to secure the performance of the condition of such a bond, and suit was brought against them upon bond and mortgage, judgment for the recovery of the money should not be rendered against the wife.

Friday,
June 10.

APPEAL from the *Allen* Circuit Court.

PERKINS, J.—Suit to foreclose a mortgage. Judgment of foreclosure.

Kirk executed a bond to *The Fort Wayne Gaslight Company*, conditioned as follows:

“The condition of the above obligation is such, that whereas the above-bound *Lewis F. Kirk* has this day assumed and guarantied the payment of two certain promissory notes, bearing date the 4th day of *April*, A. D. 1855, for the sum of 1,000 dollars each, in favor of *Daniel M. Corwin*, payable at one and two years, by *The Fort Wayne Gaslight Company*, the latter of said notes with interest: Now, if the said *Lewis F. Kirk* shall well and truly pay said notes, according to the tenor of the same, then,” &c.

This bond implies a debt due from *Kirk* to *The Fort*

* A petition for a rehearing of this case was filed on the 5th of *August*, and overruled on the 8th of *November*.

Wayne Gaslight Company, which he agrees to pay by paying a debt due from that company to *Corwin*.

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To secure the performance of the condition of the bond, *Kirk* and wife executed a mortgage to the gas company on a certain piece of property in *Fort Wayne*. It is alleged in the complaint, that there was a mistake in the mortgage in the description of the property, which was corrected in the final judgment.

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Kirk failed to pay the notes mentioned in the bond, and failed to pay the amount of them to the gas company; whereupon this suit was brought upon the bond and mortgage.

The principal objection taken to the judgment below is, that the suit is upon a contract of indemnity merely, and that no damage is shown to have accrued to the gas company by the breach of the contract. But we regard the contract as an original undertaking to pay the amount of the notes to the company, or, for their benefit, to their creditor. It implies a debt of that amount due from *Kirk* to the gas company. We think the suit well brought for the amount of the notes.

Upon the evidence, we cannot disturb the judgment below.

The judgment in form was—

1. That the plaintiff recover of the defendants the sum of, &c.

2. That the defendants pay it into the clerk's office; and, in default of their so doing, that the mortgaged property be sold.

3. That the equity of redemption be foreclosed.

Per Curiam.—That part of the first clause of the judgment for the recovery of the money, which is against the wife, is erroneous, and is reversed. The balance of the judgment is affirmed with costs.

L. C. Jacoby, for the appellants.

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The rule that when a pleading is founded upon a written instrument, the original, or a copy thereof, must be filed with the pleading, is imperative.

Thus, if a complaint founded upon a written instrument fail to aver that a copy has been filed, it cannot be assumed that it sets forth a sufficient cause of action; and the defect may be reached upon demurrer to the answer.

Where the charter of a corporation contains no special provision upon the subject, less than a majority of the board of directors have no power to transact business. Their acts are absolutely void, and the corporation cannot ratify them.

The law under which the company organized, and orders purporting to have been made by the board of directors, being in evidence, parol evidence may be admitted to show that a majority of the directors was not present when the orders were made.

Monday,
June 13.

APPEAL from the *Lagrange* Court of Common Pleas.

DAVISON, J.—The complaint alleges that *Price*, who was the defendant, on the 1st of *October*, 1854, subscribed and promised to pay for forty shares of the capital stock of said company, in such manner and at such times as the directors might require; and that the directors did require the payment for said stock to be made by installments of 10 per cent. a month, commencing on the 1st of *March*, 1855; of which requisition the defendant has had due notice, but has neglected and absolutely refused to pay the same, although six installments were due at the commencement of this suit, amounting to 600 dollars, for which judgment is demanded, &c.

Defendant's answer contains eleven special defenses, and a general denial. Issues were made on the first and tenth. The first avers that the subscription was obtained from the defendant by the fraud of the plaintiffs; and the tenth alleges "that plaintiffs have never fixed any time when the subscription, or any part thereof, should be paid; nor have

* A petition for a rehearing of this case was filed on the 19th of *July*, and overruled on the 8th of *November*.

they designated a place where it should be paid, or given defendant notice when and where to pay it; and that at the time the subscription was made, the office of the company was in this state, but before it was possible to pay the subscription, their office was removed out of the state, and has remained out of the state ever since.”

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To the second defense, the plaintiffs replied by a general traverse; and to the tenth “that they did fix a time for the payment of the subscription in regular installments, according to the statute,” &c.

To the other paragraphs demurrers were sustained. The issues were submitted to a jury, who found for the plaintiffs 560 dollars. New trial refused and judgment, &c.

The complaint is alleged to be defective, because it makes no reference to any written contract of subscription; and that that defect, being material, is available upon the demurrers to the answer.

It is enacted that “when any pleading is founded on a written instrument or an account, the original, or a copy thereof, must be filed with the pleading.” 2 R. S. p. 44, § 78. This rule seems to be imperative; the original instrument, or a copy, must be filed; and it seems to us that an averment in the complaint that such has been filed, is essential to the validity of that pleading. Under the former system of procedure, it was sufficient for the pleader to set forth the written contract sued on, according to its legal effect and operation. 1 Chit. Pl. 305.—8 Cow. 34.—2 Hill, 274. This is also a requirement of the new code. 2 R. S. p. 37, § 49. But, in addition, the code requires that the contract should, in the first instance, be laid before the Court, and thus be placed in reach of the defendant at the earliest stage of the proceedings. The instrument in suit, or a copy of it, must be filed when the pleading is filed, and unless the fact that that has been done appears on the face of the complaint, it cannot be assumed that the pleading sets forth “a sufficient cause of action.” In this instance, the complaint is obviously defective, because it not only omits to say that the contract, or a copy of it, was filed, but fails to allege it in accordance with its legal

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effect. And the result is, the pleading being thus defective, its defectiveness may be well reached upon the demurrers to the answer. Acts of 1855, p. 60.—*Bolster v. Catterlin*, 10 Ind. R. 117.

The evidence shows that the company organized under the general railroad law, in *January*, 1854; and in *October* of the same year, the directors resolved "That an assessment of 10 per centum per month be and is hereby made on all unclosed subscriptions to the capital stock of the company, and that the same be demanded and collected by the proper officers." This resolution, with other orders of the directors, being in evidence, the defendant offered to prove by a witness on the stand, that all the orders purporting to have been passed by the directors, and read in evidence to the jury, were passed and approved by three directors only, and when three, and no more, were present and in session; but his offer was refused, and he excepted.

The law under which the company organized fixes the number of directors at not less than seven, nor more than thirteen. But there is a subsequent statute which says that the stockholders may, at any of their meetings, determine that the number of directors shall consist of not more than thirteen, nor less than five. 1 R. S. p. 410, § 4.—*Id.*, p. 423, § 2. The record shows that the company, when it originally organized, appointed thirteen directors; but what the number was when the orders were passed is not shown.

There being no special provision on the subject, less than a majority of all the directors who compose the board have no power to transact the business of the company. 2 Kent's Comm. 293.—Ang. and Ames on Corp., pp. 519, 520, §§ 501, 502.—Redf. on Railw., p. 20, note 7. In view of this rule, if three directors only were present when the orders were passed, they not constituting a majority of the board, the orders were inoperative. And we perceive no reason why the proposed evidence should not have been admitted. It is true, the defendant might, in the first instance, have proved the actual number composing the board, and then shown that three, the number

present, were not a majority. But we have often decided that a party may prove the various facts of his case in the order which he prefers. *Hadden v. Johnson*, 7 Ind. R. 394. — *Piatt v. Dawes*, 10 *id.* 60.

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It is, however, insisted, that "if, in point of fact, a minority of the board of directors had made the orders, they were ratified by the whole board and by the corporation in publishing the notice, bringing this suit, and by special demand," &c. We are not inclined to favor this position. The orders, if passed by a minority, were absolutely void, because there was a defect of power. And the rule seems to be, that a void act is not susceptible of ratification. Story on Agency, §§ 240, 241.—5 Ind. R. 353.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the appellants.

J. B. Howe, for the appellees.

COWLEY v. THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY.*

This case is precisely like the case of *Price* against the same company, *ante*, 58.

APPEAL from the *Lagrange* Court of Common Pleas. *Monday, June 13.*

Per Curiam.—The complaint charges that the appellant, who was the defendant, on the 25th of *February*, 1854, made a certain note in writing in this form: "We, the undersigned, promise to pay the president and directors of *The Grand Rapids and Indiana Railroad Company* 25 dollars for each share of stock set opposite each of our names, in such manner and proportion, and at such times, as they may direct."

* A petition for a rehearing of this case was filed on the 19th of *July*, and overruled on the 8th of *November*.

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1859.

COWLEY
v.
THE GRAND
RAPIDS, &C.,
RAILROAD CO.

To this note the defendant subscribed his name, and opposite thereto annexed ten shares, 250 dollars. Judgment demanded, 300 dollars.

Defendant's answer contains a general denial, and eleven special defenses. An issue was made on the first, which avers "that the subscription was obtained from the defendant by the fraud of the plaintiffs." To the other special defenses demurrers were sustained. The issues were submitted to a jury, who found for the plaintiffs 250 dollars. Over a motion for a new trial, there was judgment, &c.

The evidence shows that the company organized under the general railroad law, in *January*, 1854, and at its original organization appointed thirteen directors; that in *October* of the same year, the company's directors resolved "That an assessment of ten per centum per month be and is hereby made on all unclosed subscriptions to the capital stock of the company, and that the same be demanded and collected by the proper officers."

This resolution, with other orders of the directors, being in evidence, the defendant offered to prove by a witness on the stand, that all the orders purporting to have been passed by the directors, and read in evidence to the jury, were passed and approved by three directors only, and when three, and no more, were present and in session; but his offer was refused, and he excepted.

The point involved in this ruling has been expressly decided in *Price v. The Grand Rapids and Indiana Railroad Company*, at the present term (1). There, it was held that such evidence was admissible; and, for the reasons given in that case, the judgment must be reversed.

The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the appellant.

J. B. Howe, for the appellees.

(1) *Ante*, 58.

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1859.

BAKER and Others v. KISTLER.*

BAKER
v.
KISTLER.

Where the only issue in a suit for work and labor, was raised by a general denial, it was *held* that evidence of payment was not pertinent.

18 68
142 632

APPEAL from the *Lagrange* Circuit Court.

Wednesday,
June 29.

DAVISON, J.—*Kistler* sued the appellants, who were the defendants, for work and labor done by him for them, at their request. Defendants answered, by a general denial. Verdict for the plaintiff. New trial refused, and judgment, &c.

During the trial, one *Coffin*, a witness, testified that he had, on his own account, and not for the defendants, paid the plaintiff several hundred dollars—he thought about 400 dollars; that in *August*, 1855, about 100 dollars was due; and that the work was all done for him, and not for the defendants. The testimony of the plaintiff, however, was, that all the work, after *August*, 1855, was done for the defendants. This was all the evidence relative to payment.

After the close of the evidence, the defendants moved to instruct as follows: “The defendants are entitled to all cash payments made. The simple question is—How much is due?” This instruction was refused, and its refusal raises the only question presented in the argument of counsel.

As we have seen, the only issue in the cause, rests upon the general denial; and the correctness of the instruction, depends upon the solution of this inquiry—Was the evidence of payment applicable to the issue?

The code says: “All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially.” 2 R. S. p. 42, § 66.

This evidently means, facts which the plaintiff, to sustain his action, is bound to prove; and we have decided

* A petition for a rehearing of this case, was filed on the 13th of *July*, and overruled on the 8th of *November*.

May Term,
1859.

BAKER
v.
KISTLER.

that "every matter of fact which goes to defeat the cause of action, and which the plaintiff is not under the necessity of proving, in order to make out his case, must be alleged in the answer." And further, "that there is no way in which the defendant can avail himself of the defense of payment, without pleading it." *Hubler v. Pullen*, 9 Ind. R. 276, and cases there cited. It is, however, contended that the instruction relates to the evidence; and that that proves a payment by a third person, which should be allowed to inure to the benefit of the defendants, and of which they have a right to avail themselves, under the general denial. We think otherwise. The evidence does not controvert any material allegation in the complaint, and for that reason, it was not pertinent to the issue. *Benedict v. Seymour*, 6 How. (Pr. R.) 298.—*Garvey v. Fowler*, 5 Sandf. 54.

The instruction, had it been given, would have directed the jury, that evidence of payments—matter which should have been set up affirmatively in bar of the action—was applicable to the issue in the cause. Hence, by refusing it, the Court committed no error.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. B. Howe, for the appellants.

A. Ellison, for the appellee.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1859, IN THE FORTY-
FOURTH YEAR OF THE STATE.

TOBIN and Wife *v.* CONNERY and Wife.

While a *feme sole* occupied certain premises, she married, and afterwards, with her husband, continued the occupation.

Held, 1. That for the time she occupied as a *feme sole*, suit would necessarily be brought against her and her husband; but unless it were shown that he received property by her at marriage or afterwards, the judgment would be levied of her separate property.

2. That for the time the husband and wife occupied the premises, the suit and the judgment, *prima facie*, should be against the husband alone.

Where the suit and the judgment in such case, were against husband and wife, jointly, there is a misjoinder both of causes of action and parties.

Although a judgment cannot be reversed for a misjoinder of causes, and will not be reversed for a misjoinder of parties curable by amendment, yet if from both, an incurable error intervenes, the judgment will be reversed.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—This was a suit by *Connery* and *Connery* against *Elizabeth Tobin* and *Patrick*, her husband. Joint judgment for the plaintiffs below against the defendants.

Monday,
November 28.

Nov. Term,
1859.

TOBIN
v.
CONNERY.

The liability of the defendants arose thus:

Elizabeth, while a *feme sole*, occupied a piece of property belonging to the plaintiffs. She married *Patrick Tobin*; and, afterwards, with her husband, continued to occupy the premises of the plaintiffs. Such are the facts of record.

For the time that *Elizabeth* occupied the premises as a *feme sole*, the suit would necessarily be brought against her and her husband; but, unless it were shown that he received property from her at marriage, or afterwards, the judgment in the case would be rendered to be levied of her separate property. 1 R. S. p. 320.

For the time the premises were occupied by *Elizabeth* and her husband after marriage, the suit, *prima facie*, should be against the husband alone; and also the judgment. Reeve's Dom. Rel., p. 136.

But, in this case, the judgment for the use and occupation of both periods of time, is a joint one against the husband and wife.

There was, in this case, a misjoinder of causes of action, and a misjoinder of parties.

This Court cannot reverse a judgment for misjoinder of causes of action alone. 2 R. S. p. 38. Nor would it for a misjoinder of parties, as that could be cured by amendment. But here is, as appears by the record, a misjoinder of causes of action and of parties, from which an incurable error has intervened in the judgment. It is impossible for this Court to distinguish how much of the judgment should have been charged upon the wife alone, and how much upon the husband alone; while it appears that none of it should have been charged upon them jointly.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. LaRue and ——— *Royse*, for the appellants.

THE LAKE ERIE, WABASH, AND ST. LOUIS RAILROAD COMPANY and Others v. ECKLER and Others.

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1859.

THE LAKE
ERIE, &C.,
RAILROAD CO.

v.

ECKLER.

A sub-contractor cannot pass by his immediate employer, and sue the principal or proprietor of the work.

APPEAL from the *Tippecanoe* Circuit Court.

Monday,
November 28.

PERKINS, J.—In *April*, 1853, *The Lake Erie, Wabash and St. Louis Railroad Company* contracted with *Boody, Ross & Co.* for the construction of their railroad.

In *May*, 1853, *Boody, Ross & Co.* contracted with *Otis, Johnson & Co.*, for the construction of a portion of said road.

In *January*, 1854, *Otis, Johnson & Co.* contracted with *Eckler & Co.*, for the completion of a portion of the road, the construction of which had been undertaken by said *Otis, Johnson & Co.* *Otis, Johnson & Co.* were to pay *Eckler & Co.*, as to times and proportions, the same as they were to be paid by *Boody, Ross & Co.*

During the progress of the work a suspension, pursuant to a right reserved, was ordered by the railroad company, and notice thereof given by the company to *Boody, Ross & Co.*, and by them to *Otis, Johnson & Co.*, and by them to *Eckler & Co.* *Eckler & Co.* then sued the railroad company, *Boody, Ross & Co.*, and *Otis, Johnson & Co.*, jointly, and charged for work done and not paid for, and for damages for a wrongful suspension of the work, &c. They obtained judgment against the railroad company, for the balance due for work done.

We do not see how this suit can be sustained against the railroad company or *Boody, Ross & Co.* It cannot be, under the old chancery rule, enacted into the code, that all parties in interest should be joined; for neither the railroad company, nor *Boody, Ross & Co.*, have any interest in the controversy arising between *Otis, Johnson & Co.*, and *Eckler & Co.*, out of an alleged breach of contract; and, to bring them within the rule, the defendants must

Nov. Term, 1859. have some common interest in the subject-matter of the suit.

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ERIE, & C.,
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V.
ECKLER.

It cannot be sustained on the ground of trust; for the contract did not provide that *Eckler & Co.* were to be paid out of the funds to be paid to *Otis, Johnson & Co.*, by their employers; and if it had, neither those employers nor the railroad company were parties to the contract. Under the old system of practice, the remedy in this case would have been at law, not in chancery.

The case is one of contract, and the remedy is between the parties to the contract.

As a general proposition of law, a sub-contractor cannot pass by his immediate employer, and sue the principal or proprietor of the work; because such is not the legal effect of the contract. See *McCluskey v. Cromwell*, 1 Kern. 593. The cases of *Faunce v. Burke*, 16 Penn. R. 469, and *The Philadelphia, &c., Railroad Co. v. Howard*, do not seem to have any bearing upon this question. Our statute provides as follows:

“Sec. 649. Any sub-contractor, journeyman, or laborer employed in the construction or repair, or furnishing materials for, any building, may give to the owner thereof notice in writing, particularly setting forth the amount of his claim, and service rendered, for which his employer is indebted to him, and that he holds the owner responsible for the same; and the owner shall be liable for such claim, but not to exceed the amount due from him to the employer at the time of notice, which may be recovered in an action.” 2 R. S. p. 182.

But no attempt has been made to bring the case at bar within this provision.

Our statute further provides—

“Sec. 522. After the issuing or return of an execution against the property of the judgment-debtor, or any one of the several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment-debtor, or is indebted to him in any amount, which, together with other property claimed by

him as exempt from execution, shall exceed the amount of property so exempt by law, such person, corporation, or any member thereof, may be required to appear and answer concerning the same as above provided." 2 R. S. p. 153.

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ECKLER.

And further sections point out the mode in which any credits admitted may be reached. See *Brisco v. Askey*, 12 Ind. R. 666.

These provisions of the statute have not been pursued; and yet they are enacted upon the hypothesis that such a suit as this at bar cannot be sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory, R. Jones, S. A. Huff, Z. Baird, and J. M. La Rue, for the appellants (1).

G. Gardner, for the appellee (2).

(1) Counsel for the appellants cited *White v. Snell*, 5 Pick. 425; S. C., 9 id. 16.

(2) Mr. Gardner, for the appellee, cited the following authorities:

The railroad company were proper parties to the action. Fonbl. Eq. 222, note a, and note * and references.—Barb. and Harring. Dig., tit. "Parties," and cases cited.—Story's Eq. Pl., §§ 262, 516.—3 Cow. 537.—Story's Eq. Juris., § 526, and references.—2 R. S. p. 31, § 18, and p. 32, § 22, and references.

The railroad company are immediately liable, either as trustees, or on account of their liability to their immediate contractors. *Kyner v. Kyner*, 6 Watts, 221, as in U. S. Eq. Dig., p. 293.—16 Penn. R. (4 Harr.) 469, as in U. S. An. Dig., vol. 6, p. 543.—Story's Eq. Juris., § 1250, and cases cited; §§ 1231, 1087, note a, 790 to 793, 1213, 1265.—*Peet v. Beers*, 4 Ind. R. 46, and cases cited.

The law, as established by these authorities, seems to be, that where a party is to be paid out of a specific fund, or one coming from an appointed source, he has a right to seek it from that fund or source, in whatsoever hands it may be at the time he brings his action. In this case, the plaintiffs (appellees) were to receive their pay from *Otis, Johnson & Co.*, they from *Boody, Ross & Co.*, and they from the railroad company, out of the fund which the railroad company had provided, or ought to have had provided, for the construction of their railroad; and if, by reason of neglect, or default of any party, the fund failed to reach its destination, viz., the hands of the plaintiffs, who were immediately engaged in the construction of the work, then the party guilty of the default, or in whose hands the fund might or ought to be, must be immediately liable to the plaintiffs, who are eventually entitled to the same.

Should the complaint be considered bad for want of charging liability as above argued, it must be held good as charging a willful and fraudulent sus-

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1859.

TERRY
v.
THE STATE.

pension of the work, or a procuring of such suspension. A full and leading case upon this point, is found in 13 How. 307. Same case in 1 Am. Railw. Cases, p. 70.

13	70
165	568

TERRY v. THE STATE.

An indictment for robbery alleged that on, &c., at, &c., the said, &c., did commit an assault, &c., and did then and there unlawfully, forcibly, and feloniously take from the person of him, the said, &c., one, &c., of the personal goods of him, the said, &c., by violence to the person of him, the said, &c., and by putting him in fear. *Held*, sufficient without alleging that the taking was against the will of the person robbed.

The indictment described the property thus: "One pocket-book of the value of fifty cents, one bank note of the value of ten dollars, one bank note of the value of five dollars, one piece of gold coin, of *American* coinage, of the value of five dollars." *Held*, that the description was sufficient.

No more particularity in the description of the property, is required in an indictment for robbery than in an indictment for larceny.

An indictment for robbery need not allege a carrying away.

What weight, if any, should be given to the statements of a witness who has been impeached by general evidence; or to the uncontradicted statements of a witness whose testimony has been, as to some points, successfully attacked by other witnesses—is a question for the jury.

An instruction to the jury, assuming that there has been no impeachment of a witness, and that there is but one mode of impeaching a witness, namely, by evidence of general bad character, was held to be erroneous.

Monday,
November 28.

APPEAL from the *Carroll* Circuit Court.

HANNA, J.—Indictment for robbery. Motion to quash overruled. Judgment of guilty, over a motion for a new trial.

Three points are presented on the motion to quash—

First. That it is not alleged that the taking was against the will of the person robbed.

We think that the averment is sufficient. It is, that on, &c., at, &c., the said, &c., did commit an assault, &c., and did then and there unlawfully, forcibly, and feloniously take from the person of him, the said, &c., one, &c., of the personal goods of him, the said *Eli Hoff*, by violence to the person of him, the said, &c., and by putting him in

fear. This substantially covers the statutory definition of the offense. Nov. Term,
1859.

The second point is, that the property taken is not sufficiently described. The averment is: "One pocket-book of the value of fifty cents, one bank note of the value of ten dollars, one bank note of the value of five dollars, one piece of gold coin, of *American* coinage, of the value of five dollars." TERRY
V.
THE STATE.

The statute is against forcibly and feloniously taking from the person any article of value by violence or putting in fear. 2 R. S. p. 402.

We suppose that no more particularity ought to be required in an indictment for this offense, in describing the property, than in a prosecution for larceny. Whart. Crim. Law, § 346.—*Id.* 1703.

It has been held that where the indictment averred that the defendant stole a bank note of the value of 10 dollars, the description was sufficiently particular. 1 Mass. R. 337. This case is cited, apparently with approbation, by this Court in *Engleman v. The State*, 2 Ind. R. 96.

The third point is, that the indictment does not charge a carrying away.

We cannot perceive that there is anything in this objection. The position assumed in argument that a robbery is a forcible larceny, and no more, is not sustained by reason or authority.

It is insisted that the finding is not sustained by the evidence, because *Hoff*, the principal witness, although he testified to the robbery, so contradicted himself upon cross-examination, and was contradicted by the evidence of other witnesses to such an extent, as to entirely invalidate his testimony. This was a question for the jury and the Court below, and we do not think it is such a case as we should interfere in, according to the former decisions of this Court.

During the progress of the trial, the state called a witness, by whom proof was made as to the personal appearance, manner, and condition of the apparel, of the defendant, on the evening of the day of the imputed crime, at

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TERRY
V.
THE STATE.

the time witness met him on his way to *Delphi*. The distance at which this meeting took place, from where the crime was alleged to have been committed, or the precise time that had elapsed, are not shown. Upon cross-examination of this witness, the defendant offered to prove his declarations made, at the time of the meeting, to the witness in reference to, or explanation of, his, then, appearance, &c. The evidence was not admitted. As the distance that intervened, or time that had elapsed, as before stated, do not fully appear, we will not decide this point, especially as the case will have to be reversed upon another point, and the facts will, without doubt, be more definitely settled, upon another trial, in regard to this question. But see 1 Greenl. Ev., § 108, and note; 3 Ind. R. 355; *Scaggs v. The State*, 8 S. and M. 722.

The last point made, is upon the ruling of the Court in reference to instructions given and refused. That asked and refused was as follows:

“When a witness stands impeached, the jury should wholly disregard his statements, unless corroborated by other evidence, as unworthy of belief, touching all matters about which he testified.”

This instruction was properly refused. What weight, if any, should be given to the statements of a witness who may be impeached by general evidence; or in reference to the uncontradicted statements of a witness whose testimony has been, as to some points, successfully attacked by other witnesses, is a question for the jury.

The charge given, being upon the same point, was as follows:

“There has been no impeachment of *Eli Hoff* in this case, and his testimony must stand good, and be entitled to full consideration from the jury. In order to impeach a witness, it is necessary to call other witnesses to testify to the general bad character of the witness sought to be impeached, and that such witness would not believe him under oath. A witness may make contradictory statements, or make statements which are not, in fact, true, and, in either case, it will be the duty of the jury to glean

from his statements that which is false, and that which is true, and not wholly discredit his entire statements."

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1859.

STEEL
V.
WILLIAMS.

It is evident that this instruction is not the law, for at least two reasons; first, it assumes a fact, to-wit, that there had been no impeachment of *Hoff*. This was a question for the jury. Second, it, in effect, said to the jury that there was but one mode of impeaching a witness, to-wit, by evidence of general bad character. Certainly, a witness might so conduct himself, and so testify, whilst upon the stand, as to discredit his whole statements; and it is equally clear that he might be so contradicted by the evidence of other witnesses as to impeach his credibility without a single witness having testified as to his general character.

Per Curiam.—The judgment is reversed. Ordered, that the clerk give the proper notice to the keeper of the state prison, &c.

J. H. Gould and *A. H. Evans*, for the appellant.

J. E. McDonald, Attorney General, and *A. L. Roache*, for the state.

STEEL v. WILLIAMS.

A justice of the peace has no power to grant a new trial or hearing of a criminal cause, after the prisoner has been once recognized, or the cause finally disposed of.

13	73
154	113

APPEAL from the *Gibson* Court of Common Pleas.

Monday,
November 28.

WORDEN, J.—This was an action by *Williams* against *Steel*, for a malicious prosecution. The complaint alleges that the defendant maliciously, and without probable cause, instituted a prosecution against the plaintiff for a larceny, before one *Holly Crawford*, a justice of the peace, upon the trial of which, the plaintiff was acquitted and discharged.

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1859.

STEEL
v.
WILLIAMS.

Demurrer to the complaint overruled, and exception. Answer in denial; trial by jury; verdict and judgment for the plaintiff; motion for a new trial overruled; and judgment on the verdict.

Objection is made to the complaint; but as the point on which the case turns, appears in the evidence, and not very clearly on the face of the complaint, we shall not further notice it.

A bill of exceptions sets out all the evidence, from which it appears that the plaintiff was arrested on the charge of larceny, upon a warrant issued by said justice, and taken before him for examination; that on the 6th of *August*, 1857, the cause was heard by the justice, and it was thereupon adjudged by him that the defendant (therein) be recognized to appear at the next Circuit Court to answer the charge, and he entered into a recognizance accordingly. On the next day thereafter, on the application of *Williams*, the justice granted him a new trial, and fixed upon a future day for the hearing, on which day the justice again heard the cause, and discharged the accused.

This evidence, in our opinion, wholly fails to make out a point essential to the maintenance of the action, viz., the discharge of the defendant in the prosecution.

When the justice had heard the cause, and adjudged that the accused be recognized to appear at the Court to answer the charge, and the recognizance had been entered into accordingly, and received by the justice, his powers and functions in the matter were at an end. The matter had then passed beyond his control, and he had no power or jurisdiction to grant a new trial, or take any other steps in the cause, except to file the recognizance, together with a transcript of his proceedings, and the papers in the case, with the clerk of the proper Court. There is no authority given to a justice, to grant a new trial on the hearing of a criminal cause, after it has been finally disposed of. 2 R. S. p. 497. In civil causes, a justice may grant a new trial within four days after entering judgment (2 R. S. p. 460, § 56); but no such, or kindred, provision is found in the statute regulating his proceedings in criminal cases. If he

may grant a new trial the next day after finally disposing of such cause, he may the next week, month, or year. We regard the proceedings of the justice, after finally disposing of the cause on the 6th of *August*, as being wholly unauthorized and void. The case then stands as if no such subsequent proceedings had been had. There was an examination of the cause, and the accused was recognized to answer the accusation. This judgment of the justice, was in no manner avoided or affected by the subsequent proceedings.

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1859.

APPELATE
V.
MASON.

For the foregoing reason, the motion for a new trial should have prevailed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. T. Embree, for the appellant.

APPELATE and Others v. MASON.

If one party has a lien upon two pieces or lots of real estate for a debt, and another party has a lien upon one of them for another debt, the latter may compel the former to resort to the other piece, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights, or operate to the prejudice, of the party holding the lien upon both pieces.

Where judgment has been taken upon a note and mortgage, and the note, mortgage, and judgment are assigned, the assignee has all the rights and remedies which the assignor would have had.

The statute does not require that a warrant of attorney to confess a judgment, with the affidavit attached, shall be appended to a transcript of the judgment offered in evidence. And if it does not appear upon the record that there was no such affidavit, the Supreme Court will not presume that there was none.

Quære, whether such a judgment, rendered without such affidavit, can be attacked collaterally.

The recovery of a judgment upon one of two notes secured by mortgage, is no waiver or abandonment of the lien upon the mortgaged premises for the amount reduced to judgment, unless the premises are taken in execution; and if they are so taken, but by the interposition of a prior equity, the execution-plaintiff is compelled to abandon his levy, his rights are the same as if no levy had been made.

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1859.

APPELLEE
v.
MASON.

Monday,
November 28.

APPEAL from the *Fayette* Circuit Court.

WORDEN, J.—Suit by appellant against appellees, to foreclose a mortgage.

The material facts, as gathered from the complaint, answers, and evidence, are, that on the 1st of *April*, 1854, the defendants, *James Miller* and *William H. Huston*, mortgaged to one *John Arnold*, a part, viz., twenty-four feet, of a lot in the town of *Connersville*, to secure two notes, each for 475 dollars, of that date, payable in one and two years.

On the 27th of *October*, 1855, *Arnold* recovered a judgment, in the *Fayette* Court of Common Pleas, against *Miller* and *Huston*, for 419 dollars, the balance on the first note.

In *April*, 1856, *Arnold* assigned the judgment so recovered, together with the remaining note and mortgage, to the plaintiff, *Mason*.

On the 27th of *October*, 1855, *Comstock & Co.* recovered a judgment against *Miller* and *Huston*, for 306 dollars, sued out an execution, which was levied upon the equity of redemption of *Miller* and *Huston*, in the twenty-four feet so mortgaged to *Arnold*, and on the 11th of *December*, 1856, the equity of redemption was sold and conveyed by the sheriff to *Applegate* and others.

In *December*, 1855, *Huston* having conveyed his interest in the premises to *Miller*, *Miller* mortgaged the same, with other property, to *Applegate* and others, to secure the payment of 4,130 dollars.

In *November*, 1855, *Miller* then owning seventeen feet in the same lot, mortgaged it, with other property, to *James* and *William Huston*, to secure the payment of 2,000 dollars.

On the 9th of *May*, 1856, *Mason* caused an execution to issue upon the judgment thus assigned to him against *Miller* and *Huston*, which was levied upon the seventeen feet above mentioned. This part of the lot was not covered by the mortgage from *Miller* and *Huston* to *Arnold*, but was the same part that was mortgaged by *Miller* to *James* and *William Huston*, as above stated. *James* and *William Huston* having a mortgage upon the seventeen feet, ob-

jected to any sale thereof, and threatened an injunction to prevent such sale, until the twenty-four feet covered by the mortgage to *Arnold* should be exhausted.

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1859.

APPELATE
V.
MASON.

Mason, content that the matter should be settled by a proper adjudication, caused his execution, with the levy indorsed thereon, to be returned. He prays a foreclosure of the mortgage, and the judgment of the Court as to whether he shall proceed with his execution and sell the seventeen feet, or whether he shall make the whole due on the note and judgment out of the twenty-four feet thus mortgaged, which is alleged to be sufficient for that purpose. *Miller* is insolvent. All the parties in interest were before the Court, and set up their respective claims in the premises.

The Court, on the final hearing, ordered the levy on the seventeen feet to be set aside, and the twenty-four feet covered by the mortgage to be sold for the satisfaction of the note and judgment.

James and *William Huston* are, of course, satisfied with the decree; but *Applegate*, and the other defendants having a joint interest with him, bring the case here for revision. The real controversy is between *James* and *William Huston*, and *Applegate*, and others claiming with him; for it is entirely indifferent to *Mason* whether he shall make the whole of his money out of the twenty-four feet covered by his mortgage, or a part of it out of the seventeen feet covered by his levy.

It will be observed that *James* and *William Huston* acquired their lien by mortgage on the seventeen feet, in *November*, 1855; and this was prior to the time when *Applegate* and his associates took their mortgage on the twenty-four feet, which was in *December* following, and they did not purchase the equity of redemption until *December*, 1856. The levy of the execution upon the seventeen feet, was not made until *May*, 1856. Hence, it appears that *James* and *William Huston's* lien on the seventeen feet accrued before that of *Applegate* and others on the twenty-four feet, either by their mortgage, or purchase of the equity of redemption. When *James* and *William Huston*

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v.
MASON.

acquired their lien on the seventeen feet, that portion of the lot was unencumbered, except by the lien of the judgment, and the twenty-four feet mortgaged being sufficient to satisfy the judgment and the remaining note, it was but equitable that *Mason* should be required to make his money out of the twenty-four feet covered by his mortgage.

“The general principle is, that if one party has a lien on, or interest in, two funds, for a debt, and another party has a lien on, or interest in, one only of the funds, for another debt, the latter has a right in equity, to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights, or operate to the prejudice of the party entitled to the double fund.” 1 Story’s Eq. Juris., § 633.

This principle is not the less applicable to the case, in consequence of the fact that *Applegate* and others acquired a subsequent interest in, and lien upon, the twenty-four feet. Their rights accrued subsequently to those of *James* and *William Huston*, and where the equities are equal, the oldest must prevail.

But it is urged that *Mason* should not have had a judgment for the foreclosure of his mortgage for the amount due on the note and judgment, because he was only the assignee of the last note, and the judgment on the first note was rendered in favor of *Arnold*, and was void, being a judgment by confession without an affidavit attached to the warrant of attorney. With reference to the first branch of this objection, it may be observed that *Arnold* assigned to *Mason*, not only the note and mortgage, but also the judgment. This was, undoubtedly, sufficient to vest in *Mason* all the rights which *Arnold* held, and entitled him to all the remedies for the collection of the note and judgment, which might have been employed by *Arnold* himself. *Vide Clearwater v. Rose*, 1 Blackf. 137.

The fact that the judgment was rendered without the proper affidavit, does not appear. The recovery of the judgment is alleged in the complaint, and admitted by the answer, and no objection is there made as to its validity.

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V.
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The transcript of the judgment offered in evidence, shows that it was taken by confession, but does not set out the warrant of attorney at length, nor does the statute require it to be thus set out. The cause of action is to be filed and copied into the judgment, and the affidavit is to be filed with the Court. 2 R. S. p. 124, §§ 384, 385. For aught that appears, there was a proper affidavit, and we cannot presume, without any basis, against the validity of the judgment.

This view of the case renders it unnecessary to inquire whether, had the judgment been rendered without any affidavit, it could be attacked in this collateral manner.

But it is further objected, that there should not have been a foreclosure for the full amount, because the debt was "subdivided" by *Arnold*, and one-half of it reduced to judgment, on which an execution had issued, and a levy been made upon the property (the seventeen feet above mentioned), which should be sold before resorting to the mortgaged premises.

The recovery of the judgment upon one of the notes was no waiver or abandonment of the lien on the mortgaged premises for the amount thus reduced to judgment. A person holding a note and mortgage, may proceed by action on the note, and subject all the debtor's property, real and personal, subject to execution, to the satisfaction of his judgment, without abandoning his lien on the mortgaged premises, unless he have taken them in execution. *Markle v. Rapp*, 2 Blackf. 268.

We need not determine whether, ordinarily, a levy upon real estate is, *prima facie*, a satisfaction of the judgment. *Vide*, however, *Doe v. Dutton*, 2 Ind. R. 309. The levy in the present case, upon the seventeen feet, can in no sense, be deemed a satisfaction, for the reason that the plaintiff was prevented from reaping any fruit from the levy. Upon the levy being made, a prior equity was interposed, which, as was properly adjudged by the Court below, required the plaintiff to abandon it, and rely upon the mortgaged premises for the satisfaction of his claim, it being admitted that they were sufficient for that purpose.

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We see no error in the proceedings below, and the judgment must be affirmed.

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Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

J. S. Reid, S. Heron, and B. F. Claypool, for the appellants.

N. and G. Trusler, E. Vance, L. Barbour, and J. D. Howland, for the appellee.

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124 537

KISER v. THE STATE.

Where an action is founded upon a recognizance, a copy of the recognizance must be filed with the complaint.

If a recognizor fail to appear at the term to which he is recognized, and forfeiture is not then taken, it cannot be taken at a subsequent term.

The recognizance, in such case, is inoperative, and the bail discharged.

Monday,
November 28.

APPEAL from the *Fountain* Circuit Court.

DAVISON, J.—This was an action by the state upon a forfeited recognizance.

The complaint alleges that *William Hill* and *David Kiser*, on the 23d of *April*, 1855, appeared before the judge of the *Warren* Circuit Court, and acknowledged themselves jointly and severally to owe, &c., to the state, 200 dollars, to be levied, &c., if default should be made in the following condition, to-wit: That the said *William Hill* should be and appear before the *Fountain* Circuit Court on the first day of the next term thereof—it being the *August* term, 1855—to then and there answer the state of an indictment for forgery, and abide the order of the *Fountain* Circuit Court, and not depart therefrom without leave thereof. Then the recognizance was to be void, &c. It is further alleged, that at the *February* term, 1857, of said Court, *William Hill* was duly called, but failed to appear in discharge of his recognizance; and that thereupon *David Kiser* was duly called by order of the Court, and then

and there ordered by the Court to bring into Court the body of *William Hill*, and save his recognizance; and failing to do so, the recognizance was then and there declared forfeited. It is also averred that *William Hill* at no time appeared in said Court in discharge of his recognizance, according to the condition thereof, &c.

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The appellant, who was the defendant, demurred to the complaint; but his demurrer was overruled, and thereupon the Court rendered a judgment that the state recover, &c.

The complaint, it is insisted, is defective on two grounds, to-wit—

1. Because it fails to show that the recognizance, or a copy of it, was filed with the pleading.

2. Because it is not shown that *Hill* and *Kiser* were called, and a forfeiture taken, at the *August* term, 1855, of the *Fountain* Circuit Court—the term at which *Hill*, in accordance with the condition of the recognizance, was bound to appear.

The statute says: “If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in Court may be lawfully required, according to the condition of his recognizance, the Court must direct the fact to be entered upon its minutes, and the recognizance of bail is thereupon forfeited.” And—“The prosecuting attorney may, at any time after the adjournment of the Court, proceed by action against the bail upon the recognizance. Such action shall be governed by the rules of civil pleading so far as applicable.” 2 R. S. p. 366, §§ 47, 48.

In reference to the first ground of demurrer, we have a statutory rule which declares, affirmatively, that “when any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading.” *Id.*, p. 44, § 78.

Here, the complaint is founded upon a recognizance; and there seems to be no reason why that obligation should not be deemed a written instrument, within the purview of the rule, and, in sequence, that rule applicable to the case at bar.

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The first ground is, therefore, well taken; because it has been often decided that, where it appears on the face of a complaint that it is founded upon a written instrument, and neither the instrument, nor a copy of it, is filed with the pleadings, the complaint will be subject to demurrer for the cause that "it does not state facts sufficient to constitute a cause of action." *Kerstetter v. Raymond*, 10 Ind. R. 199.—*Price v. The Grand Rapids, &c., Railroad Co.*, at the last term (1).—Perk. Pr., pp. 171, 222.

The second ground of demurrer remains to be considered. As we have seen, the recognizance bound the defendant to appear at the *August* term, 1855. No forfeiture was taken at that term; but at the *February* term, 1857, he was called and a forfeiture taken. This was not, in our opinion, authorized by the statute; because it expressly enacts that, "if the defendant neglect to appear when his presence in Court may be lawfully required, according to the condition of the recognizance, the Court must direct the fact to be entered on its minutes, and the recognizance is thereupon forfeited." In this instance, he neglected to appear, not only when his presence was required by the condition, but at the only time stipulated in the condition. It seems to follow that the Court, having failed to have the defendant called, and a forfeiture entered, at the term specified in the recognizance, could not, under the statute, have that duty performed at a subsequent term. And the result is that, there being no entry on the minutes of the Court of the defendant's non-appearance at the *August* term, 1855, the recognizance is inoperative, and the bail discharged. 1 Chit. Crim. Law, p. 106.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

R. A. Chandler, for the appellant.

(1) *Ante*, 58.

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WESTCOTT v. BROWN.

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18	83
159	17
159	21

Where a general denial is pleaded, a further answer of *nul tiel record* is surplusage, bad on demurrer, and may be rejected on motion.

If, in a suit founded upon a transcript of a judgment of a Court of general jurisdiction of a foreign state, the record, properly authenticated and filed as a part of the complaint, alleges personal service of process upon the defendant, he will not be permitted to controvert the allegation in his answer.

APPEAL from the *Dearborn* Court of Common Pleas. *Monday, November 28.*

DAVISON, J.—*Brown* sued *Westcott* upon a judgment of the Superior Court of *Cincinnati, Ohio*. A transcript of the record, duly authenticated, was filed with the complaint, whereby it appears that the suit in which the judgment sued on was rendered, was commenced in said Superior Court, *October 27, 1857*, by filing a petition, and causing a summons to issue against the then defendant, *Westcott*, which summons was placed in the hands of a sheriff, and by him, on the *27th of October*, in the same year, served on the defendant, personally. The transcript contains a copy of the summons, and the sheriff's return thereon, and shows that at the *December* term, 1857, of said Superior Court, the defendant having failed to appear, answer, or demur to the petition, judgment was, at that term, duly rendered against him, &c.

To the complaint in the present case, the defendant answered—

1. By a general denial.

2. That there is no such record of any such supposed recovery of *John H. Brown* against *Thomas Westcott*, in the Superior Court of *Cincinnati*, as the plaintiff in his complaint has alleged, and this he prays may be inquired of by the record.

3. That the supposed judgment was rendered without any notice to defendant of the pendency of the action wherein the same was rendered, and no process in said action was ever served upon him, nor did he ever appear, or authorize any one to appear for him, to said action, nor did he reside in the state of *Ohio*, at the time said action was

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brought, nor has he ever since resided therein; but he did then reside, and ever since has resided and been, in the state of *Indiana*.

Demurrer to the first, second, and third paragraphs of the answer, which, as to the first, was overruled, but as to the second and third, sustained. And thereupon the defendant withdrew the first paragraph, and refused to make further answer. And the Court having assessed the plaintiff's damages, rendered final judgment, &c.

As we have seen, the second paragraph of the answer is, in form, a plea of *nul tiel record*, as used under the old system of procedure. Under that system it was the proper general issue, in suits instituted upon records, where the purpose was to contest the existence of the record sued on.

The code now in force, points out no such distinctive plea, but in lieu of the general issue, as it stood at common law, simply authorizes a general or special denial. Here, the defense in question controverts the entire cause of action, and, therefore, amounts to a full denial of the complaint; and if, as such denial, it stood alone, it might be sustained. But, in this instance, it is not well pleaded; because the defendant, in his first paragraph, having, in the proper mode, pleaded the general denial, cannot be allowed, in another paragraph, to plead that which is, in effect, the same defense.

As a rule of practice anterior to the code, it was held that "a plea which amounts to the general issue, is bad, when pleaded with the general issue, and may be stricken out on motion" (8 Blackf. 256); and there seems to be no reason why the same rule should not be applied under the system of practice now in use. In this case, it is true, a motion to set aside the pleading was not adopted; but the proper result having been attained by demurrer, we are not inclined to adjudge the decision erroneous. *The Indianapolis, &c., Railroad Co. v. Taffe*, 11 Ind. R. 456.

The next question to settle, is—Was the demurrer to the third defense correctly sustained? The record upon which the suit is founded, with its authentication, was filed with the complaint, and constitutes a part of that

pleading. 2 R. S. p. 44, § 78.—9 Ind. R. 288. And it avers affirmatively, that process in the action in which the judgment was rendered, was served, personally, on the defendant. But the averment thus made, is directly controverted by the defense. Hence the inquiry arises, can that be done?

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By the constitution of the *United States*, it is declared that "full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state," and Congress is authorized, by general laws, to prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. In pursuance of this authority, Congress, by act of *May*, 1790, after providing for the mode of proof, has declared that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the *United States*, as they have, by law or usage, in the Courts of the state from whence the said records are or shall be taken." Under these provisions, it has been often decided, and is now settled, that "If a judgment *in personam* is conclusive in the Courts of the state where rendered, it has the same conclusive effect when sued on in the Courts of a different state." 2 Phil. Ev., 4th Am. ed., 187, 188, and cases there cited. But this, it has been said, "does not prevent an inquiry into the jurisdiction of the Court in which the judgment was rendered, to pronounce judgment, nor an inquiry into the right of the state to exercise authority over the cause of the parties." 2 Story's Comm. on the Const., § 1307.

There is, however, a class of cases in which it has been decided that such an inquiry will not be allowed. Thus, "where the record of a Court of general jurisdiction, on its face, shows that the defendant was personally served with process, or personally appeared to the action; because then, the record is, in that respect, conclusive, and he is estopped from denying the jurisdiction of the Court over his person." *Hall v. Williams*, 6 Pick. 232.—*Shumway v. Stillman*, 6 Wend. 447.—*Rust v. Frothingham*, 1 Breese (Ill. R.), 258.—*Welch v. Sykes*, 3 Gilm. 197.—*Lincoln v. Tower*,

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2 McLean, 473.—*Westerwelt v. Lewis*, *id.* 511.—*Newcomb v. Peck*, 17 Verm. R. 302.—*Roberts v. Caldwell*, 2 Dana, 512. These cases also decide, that if the record fails to show such service or such appearance, it furnishes, at most, but *prima facie* proof of the jurisdiction of the Court, and its authority to render the judgment; and the defendant may avoid the effect of the judgment when sued on, by showing that he was not within the jurisdiction of the Court by which it was rendered. In the case at bar, as has been seen, the record shows personal service of process on the defendant; and the authorities to which we have referred being a correct enunciation of the law, and we think they are, the third defense cannot be sustained, because it directly contradicts a material averment in the record.

In argument, the appellant refers to *Boylan v. Whitney*, 3 Ind. R. 140, which was debt upon a judgment rendered in the Supreme Court of *New York*. The defendant pleaded, *inter alia*, that he had not been served with process; that he had no personal notice of the pendency of the suit; and that he did not appear or authorize an attorney to appear to said action on his behalf. The record, when produced, showed affirmatively, that the defendant did appear by his attorney, &c. But he was allowed to show, *dehors* the record, that the attorney who undertook to appear for him, had no authority to do so. This decision is not precisely in point. The record did not aver that the defendant was personally served with process, or that he personally appeared to the action. The averment that defendant appeared by attorney, may be conclusive proof that the attorney appeared for him. Still, it is only *prima facie* evidence that the attorney was authorized to make such appearance. The latter fact, the defendant is at full liberty to disprove; and, it seems to us, that such proof does not, in any degree, controvert any fact alleged in the record. See *Welch v. Sykes*, *supra*.

In our opinion, the record before us is conclusive that the defendant was personally served with process, and that he is, therefore, estopped from denying the jurisdiction of the Court over his person.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

P. L. Spooner, for the appellant.

T. and C. Gazlay, for the appellee.

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THE PITTS-
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v.
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THE PITTSBURGH, FORT WAYNE, AND CHICAGO RAILROAD
COMPANY v. KARNS.

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151 619

Where a team was frightened by the starting of a railroad engine, ran away, and in endeavoring to stop it, the driver was thrown under the wheel of the wagon and had his leg broken—both the driver and the agents of the company being engaged in lawful pursuits—it was held that if the accident occurred through negligence on the part of the company, and the negligence of the driver did not proximately contribute to it, he might recover; but not if negligence on the part of the driver concurred to produce it, or if it occurred entirely through his own negligence.

The judgment in this case was reversed, and the cause remanded for another trial, on the ground that the case was not properly put to the jury, and the Supreme Court was not satisfied that injustice had not been done.

APPEAL from the *Allen* Court of Common Pleas.

Tuesday,
November 29.

PERKINS, J.—*Sanford R. Karns* and *John Placinger*, in January, 1857, drove wagons, loaded with lard, &c., into the city of *Fort Wayne, Indiana*, and were bound for the warehouse of Mr. *Comparet*. That warehouse stood about three rods back from a railroad track, along which locomotives and cars were frequently passing, as was well known to *Karns* and *Placinger*. *Placinger* drove his wagon up to the warehouse first, and unloaded. While he was thus engaged, the locomotive, then on the track, and standing, when he drove up, at a platform, within four hundred feet or less of the warehouse, advanced twice, up near to the warehouse, and then retired to the platform. When *Placinger* had unloaded, and driven away from the warehouse, *Karns* drove up, passing along in full view of the locomotive, then at the platform. It

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was near dusk, in the evening, and the locomotive had its head-light burning. *Karns* drove a covered wagon, and he did not remove the cover. He did not hitch his horses, nor have any one to hold them. He did not retain the lines by which he guided and controlled them, within his reach. Soon after he commenced unloading, the locomotive began to move towards the warehouse. Before it had advanced more than two hundred feet, *Karns'* horses, frightened, perhaps, by the head-light, started and ran a few rods, and then "slackened up," coming nearly to a halt, no damage as yet having been done; when, it would seem, *Karns* attempted to leap from the wagon on to the back of one of the horses to get hold of the lines, failed, fell before the wagon wheel, started the horses afresh, was run over and had his leg broken.

Taking the evidence, in connection with the short distance the locomotive had moved, the grade and curvature of the road, and the character of the engine, it is manifest the locomotive was moving, when the horses started, at a speed of less than four miles an hour. The great preponderance of evidence is, that the signal bell was rung, and the whistle blown. Two or three witnesses do not recollect that they heard either, and think there were no such signals, while an equal or greater number swear that both the signals were given.

Negative testimony of mere bystanders touching such facts, especially where there was nothing to call their attention particularly to the facts, and perhaps much to divert it upon other facts, is of very little weight. Every man's experience will bear out this assertion. A clock may strike a succession of hours, and one reading or talking, or otherwise engaged, in close proximity to it, will not notice the fact.

Karns sued the railroad company and recovered judgment for 3,000 dollars.

The accident to Mr. *Karns* happened, as the evidence shows, when both parties concerned were engaged in lawful pursuits. Mr. *Karns* had a right to go to *Comparet's*

warehouse, and deposit his load. But, in doing so, he could not but have known that he was going to a place in which the lawful pursuit of business by the railroad company would expose him to danger; and, hence, would impose upon him the obligation of exercising caution to avoid accident. That his conduct exhibited an utter disregard of caution, there can scarcely be a doubt. Still, if this want of caution did not proximately contribute to the accident, and the carelessness of the railroad company alone was the immediate cause of it, *Karns* might recover.

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The only carelessness alleged against the railroad company is, that no signal was sounded when the locomotive started, and that it moved at a rate of speed exceeding four miles an hour.

Concede, for the purposes of this case, that these facts existed, the questions would then arise, did they occasion the accident? And, even if they contributed to it, did the carelessness of *Karns* also concur with them immediately to its production? If the company failed to ring the bell and blow the whistle, still, if such failure did not cause the horses to run away, the company are not liable. If the whistle and the bell would more likely have frightened the horses than otherwise, from the nearness of the engine to them; or, if *Karns* would have pursued no different course from that which he did pursue, if these facts had occurred, he was not injured by their non-occurrence.

Again, if the accident to *Karns* happened after the horses had "slackened up," through his own rashness, or foolhardiness in attempting to jump from his wagon on to the back of his horse, when he might have got out upon the ground, or remained in the wagon, without injury, surely, it might be inferred by a jury that his own wrong contributed directly to the injury of which he complains.

Without detailing the proceedings in the Court below, we remark, generally, that the case was not put to the jury as it should have been, and we do not feel satisfied that injustice has not resulted. See the cases of *Button v. The Hudson River Railroad Co.*, 18 N. Y. R. 248; *Steves v. The Oswego, &c., Railroad Co.*, *id.* 422.

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THE LAFAY-
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Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

F. P. Randall and *W. W. Carson*, for the appellants.

13	90
125	479

13	90
149	180

13	90
168	218

THE LAFAYETTE PLANKROAD COMPANY v. THE NEW AL- BANY AND SALEM RAILROAD COMPANY.

Quære, whether the fact, that a juror sitting upon a trial is not a householder, is sufficient ground for a new trial, where the party asking the new trial was ignorant of the fact at the trial.

The fact that a juror sitting upon a trial is ignorant of the *English* language, is sufficient ground for granting a new trial.

The failure to examine the juror upon this point before accepting him, cannot be imputed as negligence. It may be presumed that the officer has called a jury competent in this respect.

The fact of such incompetence may be proven by the juror's statement under oath, without a violation of the rule that jurors are incompetent to impeach their verdicts.

The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry, which may compete with the former in the transportation of freight and passengers between given points; and the mere fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages.

The ground occupied by an existing company, or their franchise, may be taken, if authorized by the legislature, by a subsequently chartered company, upon making compensation.

Where any part of the road-bed or track of an existing company, or the property of an individual is taken, so that a proceeding under the statute may be had for the assessment of damages, all the damages occasioned by the taking, both to the ground and franchise, must be assessed and recovered in the statutory proceeding.

The appraisal of land damages, is a bar to claims for injuries by fire from engines, obstructing access to buildings, exposing persons or cattle to injury, cutting off the flowage of water, &c., even though such damages were unknown to the appraisers at the time of the assessment.

But where no part of the property of an existing company, or of an individual, is taken, unless the statute plainly authorizes a proceeding to assess damages for consequential injuries, such damages may be recovered in an ordinary action at law.

In the construction of the work for which the property of another is taken, reasonable care and skill must be exercised, or the party will be liable to an action for the tort, as at common law.

In an action in the nature of an action on the case to recover such damages, it may be presumed that the plaintiff had claimed and recovered under the statute, such damages as the location selected would occasion.

A party proceeding under the statute to recover such damages, may have an injunction till the damages are paid; and, perhaps, to control the location. In the proceeding for the assessment of damages, the question of location is examinable.

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APPEAL from the *Clinton* Circuit Court.

Tuesday,
November 29.

PERKINS, J.—This was a suit, in the nature of an action on the case, at common law, by *The Lafayette Plankroad Company* against *The New Albany and Salem Railroad Company*, to recover damages for injury done by the latter company to the former, in the construction of a railroad..

The plaintiff recovered on the first trial. The defendant moved for a new trial on two grounds—

1. That one of the jurors who sat upon the trial, was not a householder.

2. That one of the jurors who sat upon the trial, did not understand the *English* language.

The Court granted the new trial for the second cause.

We are not prepared to say that the new trial might not have been granted for the first cause. The fact that the juror was not a householder, was a good cause of challenge. But the challenge was not made, nor was the juror interrogated as to his qualifications.

Had the defendants known that the juror was incompetent at the trial, their failure to raise the objection would have been a waiver of it. It appears that they were then ignorant of the fact. Whether their neglect to make inquiry as to the fact, before accepting the juror, should be held a waiver, we need not here decide, as we are clear that the new trial was properly granted for the second cause. *Hogshead v. The State*, 9 Humph. 59. That cause was, as we have seen, that one of the jurors could neither read nor write the *English* language, nor could he understand it when spoken to him upon subjects, other than such as related to his particular business, farming, and then but imperfectly. The defendants were not aware of

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the fact till after the trial; and though they might have examined the juror touching this point before accepting him, we do not think the failure to do so can be considered negligence. The party might well presume that the officer had called a juror competent in this particular.

The fact that the juror was thus incompetent, was proved by his own admission under oath; and it is objected that this mode of establishing the fact was forbidden by the rule, that jurors are incompetent to impeach their verdicts. The case does not fall within the rule. It was not a fact as to misbehavior of the jury, but as to competency to serve as such.

On the second trial, the judgment was for the defendants.

The plaintiffs appeal, and seek a reversal of that judgment.

The controversy arises upon these two general facts—

The plankroad company had constructed their road.

Subsequently, the railroad company constructed theirs, crossing the plankroad, not at right angles, but at such an angle as occasioned the extending of the railroad almost parallel with the plankroad, for about a quarter of a mile, and so near to it, as, it is alleged, to render traveling upon the latter, dangerous, owing to the fright of horses by the locomotives, whereby the franchise of the plankroad company was depreciated in value, and injured to ——— dollars, &c.

The legal propositions applicable to these facts, are well settled.

1. The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, a bridge, or a ferry, which may compete with the former in the transportation of freight and passengers between given points; and the simple fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either, to damages. *Bush v. The Peru Bridge Co.*, 3 Ind. R. 21.

2. The ground occupied by an existing company may

be taken, if authorized by the legislature, by a subsequently chartered company, upon making compensation. *The Newcastle, &c., Co. v. The Peru, &c., Co., id.* 464.

3. The franchise of an existing company may be thus taken. Redf. on Railw., p. 129.

4. Where any part of the road-bed, or track, of an existing company, or the property of an individual, is taken, so that a proceeding under the statute may be had for the assessment of damages, all the damages occasioned by the taking, both to the ground and franchise, must be assessed and recovered in the statutory proceedings. *The Newcastle, &c., Co. v. The Peru, &c., Co., supra.*—Redf. on Railw., p. 152, *et seq.* See, also, Perk. Pr., p. 680. It is settled that the appraisal of land damages, is a bar to claims for injuries by fire from the engines, obstructing access to buildings, exposing persons or cattle to injury, cutting off the flowage of water to buildings, from springs, &c., even though such damages were unknown to the appraisers at the time of assessing the damages. Redf. on Railw., p. 154.

5. But where no part of the property of an existing company, or an individual, is taken, in such case, unless the statute plainly authorize a proceeding to assess damages for consequential injuries, such damages may be recovered in an ordinary action at law. *The Evansville, &c., Co. v. Dick*, 9 Ind. R. 433.—Redf. on Railw., *supra.* But,

6. In the construction of the work for which the property of another is taken, reasonable care and skill must be exercised, or the party will be liable to an action for the tort, as at common law. *Conwell v. Emrie*, 4 Ind. R. 209.—Redf. on Railw., p. 153.—6 Gray (Mass. R.), 544.—10 Cush. 385.

In the case at bar, the jury found that the railroad company constructed their work with care, skill, and good faith. No complaint is made of the instructions given to the jury by the Court.

But it is contended that the railroad company might have selected a different line for their road, whereby they would have injured the plankroad company less. It is too

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late now to raise this question. The plankroad did, as we may presume, after the railroad company had made their location, apply, under the statute, for damages, and claim and recover such as the location selected would occasion (see *The Martinsville, &c., Railroad Co. v. Bridges*, 6 Ind. R. 400); and they might have had an injunction till the damages were paid; and, perhaps, to have controlled the location.

In the proceedings for the assessment of damages, the question of location was examinable. *The New Albany, &c., Railroad Co. v. Connelly*, 7 Ind. R. 32. It is not denied that that mode was within the limits prescribed by the charter.

Per Curiam.—The judgment is affirmed with costs.

R. Jones, S. A. Huff, and R. C. Gregory, for the appellants (1).

H. W. Chase, J. A. Wilstach, J. E. McDonald, and S. C. Willson, for the appellees (2).

(1) Extracts of the argument of counsel for the appellants:

What the exact rule may be that will govern the determination of this Court upon being asked to review the action of a lower Court in granting a new trial, it is somewhat difficult to determine.

In *Jones v. Coopriders*, 1 Blackf. 47, this Court reversed the cause because the Circuit Court had improperly granted a new trial, and ordered judgment to be entered on the first verdict. The new trial had been granted because the Court below held that illegal evidence had been admitted on the first trial, which evidence this Court held to have been legal and proper.

In *Cummins v. Walden*, 4 Blackf. 307, the same ruling was made, when the new trial had been granted on affidavits which did not show a sufficient reason therefor.

The rule is clearly stated by SULLIVAN, J., in *Bisel v. Hobbs*, 6 Blackf. 479. He says: "So when a verdict has been set aside, and a new trial granted for reasons not recognized by the law, and upon the second trial judgment has been rendered in favor of the party obtaining the new trial, the judgment will be reversed, and the party that obtained the first verdict, will be restored to his rights under that verdict."

In *Nagle v. Hornberger*, 6 Ind. R. 69, it is said: "The Court will more readily control the discretion of the Court below in refusing a new trial, than in granting it."

And in *Powell v. Grimes*, 8 Ind. R. 252: "The Court would very reluctantly set aside the granting of a new trial—perhaps a case might occur in which it would do it—but when the Court below conducting the trial is not satisfied with its fairness, we would be slow to differ with it."

Leppar v. Enderton, 9 Ind. R. 353, and *Cronk v. Cole*, 10 id. 485, are to the same effect. Each of them were cases in which there was a sufficient cause stated for a new trial, and an attempt to show the cause stated to exist; and where the cause was one to be made out by evidence, the affidavits were such as could be received for that purpose.

The rule of this Court, as deduced from the cases adjudicated by it, would seem to be, that granting a new trial is not erroneous, unless it is clearly shown by the record, that such new trial was granted for "reasons not recognized by the law;" or if granted for causes to be made out by proof, that there was no legal proof tending to show the existence of such causes.

There can be no new trial granted, except for some one of the reasons specified in § 352, 2 R. S. p. 117.

The cause for which this new trial was granted, if it can be ranked under any of the statutory causes (which is denied), must be held to be within the second named in said section, "misconduct of the jury."

Admitting the speaking *German* in the jury room, or the fact of one sitting as a juror, who did not fully understand what was said by the Court, the counsel, &c., was misconduct within the statute; we insist there is no legal proof of such misconduct. The only attempt at proof is by the testimony of the two jurors, *Wehr* and *Smith*, given either in their affidavits, or in their examination by the Court. The rule of law is clear, that "the affidavits of the jurors themselves, of their misconduct, are not admitted to impeach their verdict." *Drummond v. Leslie*, 5 Blackf. 454.—*Dunn v. Hall*, 8 id. 32. Within this rule, the evidence of misconduct was wholly inadmissible, and consequently should be stricken out, thus leaving the case without any evidence tending to show the existence of the cause alleged for a new trial.

* * * * *

Every paragraph of the answer is certainly bad, under the recent rulings of this Court; and the demurrers to them should have been sustained, because the gravamen is a consequential injury, and the damages therefor could not be recovered under the statutory proceeding. *Tate v. The Ohio, &c., Railroad Co.*, 7 Ind. R. 479.—*Hutton v. The Indiana Central Railway Co.*, id. 522.—*The Evansville, &c., Railroad Co. v. Dick*, 9 id. 433.—*The Indiana Central Railway Co. v. Boden*, 10 id. 96.

It is alleged in the complaint that the defendants, by the peculiar location and manner of construction of their road, had done the plaintiffs unnecessary damage, &c. This is reiterated in the reply. The demurrer to the complaint, and that to the reply, present the question, whether, when property was taken possession of under the internal improvement act of 1836, and governed by that alone, an action at law could in any case be maintained. That act provides that private property may be taken possession of, &c., "avoiding, in all cases, unnecessary damage or injury to the proprietors."

So long as no unnecessary damage is done, the statutory right only is exercised, and the statutory remedy for taking property is the only one. But when "unnecessary damage is done," the statutory right is exceeded, its protection forfeited, and the ordinary remedy for the invasion of a private right may be resorted to by the party injured. So it has been ruled under similar enactments. *Lawrence v. The Great Western Railway Co.*, 6 Railw. and Canal cases, 656.—*The Queen v. Scott*, 3 id. 187.—*Conwell v. Emrie*, 4 Ind. R. 209.

The rule above stated is no new one, but has long been of frequent applica-

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tion in large classes of cases. We need only mention the familiar ones of distress for rent, distress made damage feasant, estrays, &c.; in all which cases, if the party making the distress, taking up the stray, &c., does any act the law has forbidden, that is, exceeds the right given him by law, he becomes a trespasser *ab initio*, and may be proceeded against as such.

So here, if the defendants exceeded the power vested in them, that is, have done unnecessary damage, an action at law is the appropriate remedy. *Conwell v. Emrie*, 4 Ind. R. 209.

What is unnecessary damage within the meaning of the act of 1836? Is the damage inflicted a necessary one, because it was done in constructing a railroad, if it is constructed in such a place and manner, as to cost the railroad company the smallest possible amount?

This cannot be the meaning of the expression, especially when you come to apply it to a case like the present, where one corporation is interfering with the rights vested in another. The history of the rulings of the Courts, upon questions growing out of the exercise of the right of eminent domain, is a curious and instructive one. It certainly was a wonderful exertion of the legislative functions sometimes assumed by Courts, when they held that a state could transfer to a private corporation the right of eminent domain, to be exercised for the exclusive profit of the corporators, giving to the corporators this high prerogative, to go as a part of the investment, into a mere private speculation. But it was done upon the hypothesis assumed, that the prerogative was to be exercised only for the public good—a hypothesis as false in theory as it is in practice.

It would have seemed that this species of legislation was exhausted over a given subject-matter, when it had become the property of a corporation under the exercise of this high prerogative; that the right of eminent domain conferred on one corporation, and exercised by it, could not be again conferred on another, so as to embrace the same property, or any part of it. This was clearly the first leaning of the Courts. *The Hudson River, &c., Canal Co. v. The New York, &c., Railroad Co.*, 9 Paige, 323.—*The Canal Co. v. The Railroad Co.*, 4 Gill and Johns. 1.—*The Seneca Road Co. v. The Auburn Railroad Co.*, 5 Hill, 170.

But an imperious necessity intervened, and the Courts, under its pressure, must again legislate, to avoid what upon principle was the obvious and proper result of their previous action. So they held that the rights vested in one corporation might be interfered with by another corporation under a like grant of eminent domain, so far as necessary to carry into effect the public purposes for which the latter had been created. This is the doctrine of the Courts at the present time. They have universally placed this limit upon the right of one corporation to interfere with, or take, the corporate franchises or property of another corporation. The rule is clearly stated in *Springfield v. The Conn., &c., Railroad Co.*, 4 Cush. 63, where the Court, in discussing the power of a railroad company to construct their road upon a highway, so as to obstruct the highway, says, p. 72:

“In the present case, it is manifest there are no words in the act of 1845, which give the defendants authority to locate and construct their railroad over *Front* street, where it was actually laid, or over any other highway in *Cobaltville*; and if they had the power, it must be derived from necessary implication, though no such implication appears on the face of the act. If it exist,

it must arise from the application of the act to the subject-matter, so that the railroad could not, by reasonable intendment, be laid on any other line. The grant of the right is, by reasonable construction, a grant of power to do all the acts necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing its being laid elsewhere; but if to the minds of reasonable men, conversant with the subject, another line could have been adopted between the *termini* without taking the highway, and reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking of the highway." See, also, 21 Vt. R. 590; Pierce on Am. Railr. Law, pp. 10, 11, 216, 217. The author last cited (p. 216) says: "Where the route selected by two companies incorporated to construct independent lines interfered, the *termini* only of each being prescribed, and there being no necessary conflict on the face of the charter, or in their objects, the prior right to particular land was held to attach to the company which first actually surveyed and adopted a route," &c.

And this rule is in accordance with the most recent doctrine of all the Courts of this country.

The necessity that will authorize the seizing on the corporate property, or interfering with the franchises of another corporation, must be an actual necessity—one that all men would understand and appreciate to be such. Such necessity does not exist, when all the public purposes of the latter corporation could be equally as well effected without doing the injury. The saving of a few thousand dollars does not create this necessity.

* * * * *

(2) Extracts from the argument of counsel for the appellees:

We propose to take up the questions arising in the record in their order, and, without meeting the arguments of the appellants' counsel *seriatim*, to discuss them incidentally where inconsistent with our theory of the case.

The appellee was entitled to have the first verdict set aside, and there was no error in granting the new trial, even though the Court may have based its action upon a wrong cause.

The appellants had no right to seek a remedy for the alleged injuries in this form of action, but were bound to file their application for the assessment of their damages in the mode provided by the appellees' charter. That the appellees are, *prima facie*, entitled to have parties claiming damages for the construction of their railroad seek the charter remedy, and have appraisers appointed for their assessment, is no longer an open question. It was expressly so held in *The New Albany, &c., Railroad Co. v. Connelly*, 7 Ind. R. 32, which is in accordance with all the adjudications upon similar questions in this and our sister states.

* * * * *

The principle for which we contend, in support of the demurrers, and upon which the instructions refused were based, as well as the foundation for the interrogatories propounded to the jury, is, that if the appellees, in the proper use of their franchises, exercising good faith and reasonable care and skill, located, constructed, and operated their railroad across the plankroad, they are within their charter, and not liable as a wrongdoer. The statute of 1838, p.

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343, § 16, enjoining doing no "unnecessary damage," must have a reasonable interpretation. Where only the *termini* of a railroad are fixed by the charter, the selection of the particular route, the mode of construction, and the operation of the work, must of necessity be left to the sound discretion of the company. The location and mode of construction, being matters depending upon skill and judgment, all that reason and justice require is, that good faith, reasonable skill, and due care should be exercised. Were any other rule adopted, there would be no safety whatever in the location or construction of any public work. Indeed, every expert called in the case, and their number was large and embraced men who have been engaged as civil engineers in locating canals and railroads ever since works of that kind were projected in the state, testified to the jury that they had never located a line of road, although done with the best intentions and to the best of their ability, but that after the work was completed, they could see where it was susceptible of improvement. There is not, we apprehend, in the whole state, a line of railroad but that would be condemned by competent engineers as improperly located in many parts of the route. Opinions are as various as the men who entertain them. "The company is clothed with a discretion, not indeed arbitrary, but to be exercised, *bona fide*, of doing the works necessary to accomplish the main purpose authorized by the act, in such a manner as reasonable, careful, and skillful men would judge expedient and fit." *Pierce on Am. Railr. Law*, p. 14. Indeed, it is expressly decided that the company are the judges of what the exigency of their work requires. *Brainard v. Clapp*, 10 Cush. 6.—*Mellen v. The Western Railroad Co.*, 4 Gray, 301.

* * * * *

But the appellees' counsel now insist upon a new ground in support of their claim to a common-law action, and argue that the damages were entirely consequential, and, therefore, not embraced in the charter remedy. Several recent decisions of this Court are cited as authority to sustain the position. We cannot admit that the damages complained of are strictly consequential. It is alleged in the complaint that the railroad company took possession of the plankroad bridge, and destroyed it, and used the appellants' road-bed. This was a direct injury, and drew after it, as an incident, the other injuries complained of. Still, we are disposed to meet and answer the arguments of the appellants' counsel fully, upon the position as now assumed.

The question thus presented is one of the greatest possible importance to the appellees, and every other railroad or canal corporation in the state, organized under the internal improvement act of 1836; and we propose to examine it carefully, for the purpose of showing the appellants' position to be untenable.

By the 16th section of the act of 1836 (R. S. 1838, p. 343), the board of internal improvement were authorized "to enter upon, and take possession of, and use all and singular, any lands, streams, and materials," in the building of railroads, &c. By § 17, "In all cases where persons may feel aggrieved or injured by the construction of any of the works," &c., "the person or persons so feeling aggrieved or injured, shall make out a written statement of the cause of such complaint," &c., "and deliver the same to the members of the board," &c. Then follow provisions for the appointment of appraisers to assess the damages, and for appeals to the Circuit Court. In order to give a fair construction to this statute, we must take into consideration the provisions

of the constitution then in force, the nature of injuries for which damages could be awarded, and the purposes and objects sought to be obtained by the legislature in the passage of the act.

Section 7, art. 1, of the constitution of 1816, provides that "No man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor." Section 21, art. 1, of the present constitution, is similar in its language and meaning, except that the words "or applied to public use" are omitted, and provision is made that the damages, except in case of property taken by the state, must first be assessed and tendered.

In *The Evansville, &c., Railroad Co. v. Dick*, 9 Ind. R. 433, Judge DAVISON, delivering the opinion of the Court, says: "As we are advised, a proper construction of the word 'taken' makes it synonymous with seized, injured, destroyed, deprived of."

Therefore, had the state, under the act of 1836, put in and used the railroad crossing which is alleged to have injured the plankroad; and deprived the appellants of its use, it would have been a taking for which a compensation would have been allowed. Now it must be, that the act in question contemplates a remedy for every injury necessarily resulting from the construction of the work, that could be the subject of legal redress in any form; otherwise, it must be held unconstitutional in so far as it purports to authorize acts which must occasion even unavoidable but consequential injuries. *The State v. Beackmo*, 8 Blackf. 246. The state, in its sovereign capacity, could not be sued, and if the special remedy is not broad enough to cover all unavoidable injuries, then all those acts producing such injuries would be unauthorized by law, and the parties engaged in the work producing them would be trespassers. This would be to determine the general internal improvement law ineffectual for the purposes contemplated by the legislature, as understood and acted upon by the Courts, and all others interested since its enactment.

It would seem that the provision in § 17 of the act that, "in all cases where persons may feel aggrieved or injured by the construction of any of the works," &c., they may file their claims and have their damages assessed, would naturally be understood to cover every conceivable injury, without resorting to authorities in support of such construction; still, as the appellants' counsel appear confident in their new position, we urge the following as conclusive against them:

In *Kimble v. The White Water, &c., Canal Co.*, 1 Ind. R. 285, a consequential injury, occasioned by diverting a stream of water from the plaintiff's mills, was held not to be the ground of a common-law action, but that the special remedy must be followed. The charter remedy of that company is not so comprehensive as that of the appellees.

The *Massachusetts* statute on the subject, enacts that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out, and making and maintaining their road, or by taking any land or materials as provided in the preceding section." The *Eastern Railroad Company* in grading their track, passed through a ledge of rocks on lands adjacent to the plaintiff's, and in the necessary blasting of the rock, injured his house. The Court say: "It is a well settled principle, that when the legislature, under the right of eminent domain, and for the prosecution of works for public use, authorize an act or series of acts, the natural and necessary consequence of doing which,

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will be damage to another, and provide a mode for the assessment and payment of the damages occasioned by such work, the party authorized, acting within the scope of his authority, is not a wrongdoer; an action will not lie as for a tort, and the remedy is by the statute, and not at common law." *Dodge v. The County Commissioners, &c., of Essex*, 3 Met. 380 (1 Am. Railw. Cases, 336). Several cases are cited in support of this doctrine. See, also, the recent case of *Perry v. The City of Worcester*, 6 Gray, 544, where this doctrine is clearly stated and settled.

The case of *Lawrence v. The Great Northern Railroad Co.*, 4 Eng. Law and Eq. 265 (6 Railw. and Canal Cases, Eng. ed., 656), decided that the railway company were liable in an action on the case for flowing lands, and this case might at first seem to sustain the appellants' argument, but PATTERSON, J., in pronouncing the opinion, says: "Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think the want of such caution is sufficient to sustain the action." This shows that the railway company were liable in a common-law action, because they had exceeded their chartered rights, and were wrongdoers, and not because the injuries were consequential.

A case very similar to the last, has been decided in *Massachusetts*, in the same way and for the same reason. The injury complained of, was the obstruction by a railroad company, whereby the plaintiff's lands were flooded, and a remedy was sought under the statute. The Court held, that "it was not warranted by their charter, and, therefore, not a necessary or incidental damage, caused by the exercise of those powers for the public use, and so not a loss to be compensated by damages for the appropriation of private property to public uses," and that an action on the case would lie. *The Proprietors of Locks, &c. v. The Nashua and Lowell Railroad Co.*, 10 Cush. 385. A careful examination of all the authorities will show that where the charter remedy is co-extensive with the injuries naturally resulting from the proper use of the authority conferred, a common-law action will not lie. It is impossible to assign a reason why any distinction should be made in the assessment of necessary damages that are the direct result of appropriating lands, or the consequential result of the proper construction of the work, if the charter remedy embraces both.

This brings us to consider the effect of the recent rulings of this Court, in the cases relied upon by the appellants' counsel. The first case is *Tate v. The Ohio and Mississippi Railroad Co.*, 7 Ind. R. 479, where it is held that an action would lie for injuries consequent upon the raising of an embankment in a street opposite *Tate's* lots, whereby access to them was prevented. The Court say: "The structure is an unauthorized obstruction of a public highway." The remedy afforded in the charter of this railroad company will be found in § 15, p. 624, Local Laws of 1848, as follows: "That in all cases where any person or persons through whose land the road may run, shall refuse to relinquish the same, or when a contract between the parties cannot be made for materials along the route," damages are to be assessed by six persons of the neighborhood, sworn for that purpose before a justice of the peace, upon "view of the land and materials," after taking into consideration the advantages and disadvantages, &c., of the work. It will be seen that the charter remedy only applies to land and materials actually appropriated, and does not extend to consequential injuries. This case does not sustain the appellants' argument, first,

because the embankment is held to be an unauthorized obstruction of the street, and secondly, because the charter did not provide a remedy for consequential injuries. We may add, that no point was made either in the pleadings below, or in the Supreme Court, that an improper remedy was sought.

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The cases of *Hutton v. The Indiana Central Railway Co.*, 7 Ind. R. 522, and the same company v. *Boden*, 10 id. 96, both proceed upon the ground that the charter remedy did not embrace consequential injuries. In the last case, which was commenced under the statute, the Court say: "Still the plaintiff is not without remedy; because it has often been decided that a railroad company, for an injury which necessarily results to private property from the construction of their work—there being no remedy given by their charter—is liable at common law." In the case of *The Evansville, &c., Railroad Co. v. Dick*, 9 Ind. R. 438, it was held that consequential damages were recoverable in an action on the case, because the legislature had no right to authorize an injury without providing a remedy, and as the charter did not make provision for this recovery, the injured party had his common-law action.

Protzman v. The Indianapolis, &c., Railroad Co., 9 Ind. R. 467, was decided upon the same grounds. It is true, in this case, Judge PERKINS refers to *The New Albany, &c., Railroad Co. v. Connelly*, 7 Ind. R. 32, as determining that the statutory remedy must generally be followed; but that it has been considered that for such consequential injuries, the property has not been so taken as to justify that remedy, and that, therefore, the party is left to the ordinary one at law. But it is apparent that the distinction between the comprehensive charter remedy of the appellees, and the limited one of the *Indianapolis and Lawrenceburgh Railroad Company* was not pointed out or considered.

Eward v. The Lawrenceburgh, &c., Railroad Co., 7 Ind. R. 711, was an action of trespass for work done upon a line of railroad which was afterwards abandoned and the road re-located a mile or so from the land. The company claimed that the remedy was under their charter, but the Court decided that the charter remedy was for those through whose land the road should run, and that the common-law action would lie. See numerous authorities cited in *Redf. on Railw.*, in the chapter "Lands injuriously affected," p. 175.

We have thus endeavored to show that the decisions of this Court do not sustain the position that the appellees are not liable, under their charter, for consequential injuries.

* * * * *

The appellants' property in the plankroad, and their franchises secured by their charter, were the subjects of appropriation in the same manner, if necessary for the railroad, as though they had been private property. *Pierce's Am. Railr. Law*, 151 to 160.—*The Newcastle, &c., Railroad Co. v. The Peru, &c., Railroad Co.*, 3 Ind. R. 469.—*The Richmond, &c., Railroad Co. v. The Louisa Railroad Co.*, 13 How. 71.—*Redf. on Railw.*, p. 129.

* * * * *

The first verdict was properly set aside for the incompetency of the juror, *Samuel Wehr*.

Counsel for appellants, in commenting upon the action of the Court in granting the new trial for this cause, deny that it is one recognized by the statute, and insist that if it is, it must be classed as "misconduct of the jury." We think that placing a man upon the jury who was so ignorant of the *English* language that he "could not understand the evidence of witnesses, the argument of

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the counsel, or the instructions of the Court," which ignorance was unknown both to the parties and the Court until after the rendition of the verdict, was an "irregularity in the proceedings of the Court, by which the party was prevented from having a fair trial," and an "accident or surprise which ordinary prudence could not have guarded against," and was thus a cause for a new trial, within the first and third clauses of § 352, 2 R. S. p. 117.

We take the position that a competent juror must be a man of sound mind, of ordinary intelligence, and having a sufficient acquaintance with the *English* language to understand the evidence of the witnesses, and the instructions of the Court. We are not urging a standard of memory, or even a capacity to comprehend all the facts and instructions in a complicated trial of several days duration. But unless a man understand the language sufficiently to appreciate the testimony so as to form some intelligent judgment of what it proves, and be able to apply the instructions of the Court to it, he ought not, in justice to parties, to be permitted to sit upon a jury. *Wehr* could do neither, and was, therefore, incompetent, and for that reason, the cause was not tried, in the first instance, by a legal jury. We quote the following case at length, upon this point: In *Hogshead v. The State*, 6 Humph. 59, REXSE, J., delivered the opinion of the Court, as follows:

"The plaintiff in error was indicted for a felony in passing and offering to pass a counterfeit *Mexican* dollar. The defendant below elected as one of the jury, an individual who, it seems from the affidavits made to procure a new trial after his conviction, was of intemperate habits. The general state of these habits was known to defendant and his counsel, but the latter did not know, and it does not appear that the former knew, that these habits had frequently produced the bodily and mental disease called *delirium tremens* or *mania a potu*. It appears from the affidavits referred to, that during the investigation of the cause in Court, the manner of the juror indicated him to be in a state of dull and stupid abstraction. At night the jury were taken, in care of an officer, to some room in town, to consider of their verdict, and to be kept together. About eleven o'clock at night, the juror became much indisposed, and was threatened with spasms, and on the verge of an attack of *delirium tremens*.

"The physician who usually attended him on such occasions, was sent for; and he testified, that from the condition in which he found his patient, and from the knowledge he had of his case in general, and from attendance on him during former attacks, that he could not have been, during the investigation of the cause in Court, in a condition to have possessed himself intelligently, of the facts and circumstances of the case, so as to have performed, in a rational manner, the duties of a juror. In the morning, the juror continued dull and stupid, but on taking a draught of ardent spirits and breakfasting, he seemed pretty well. Some of the jury testified that he manifested more intelligence than they had expected, in discussing with them the testimony; but whether his knowledge in this respect, was the result of attention in Court, or was picked up in the jury room, they did not know. It does not appear that before the verdict was given, the prisoner or his counsel knew of the condition of the juror during the preceding night. Upon the whole case, we think the prisoner is entitled to a new trial; not on the ground that the juror may have been under the influence of ardent spirits, as stated by one of the witnesses, when he first entered the jury box, or that he took a draught of ardent spirits on the morning the verdict was rendered; nor on the ground of the slight sep-

aration of the jury, which became necessary when the physician visited the juror (where, we think, it is shown nothing improper took place); but upon the ground that it is probable that during the investigation of the cause in Court, and the deliberation of the jury upon their verdict, the juror in question was not in a state of mental and bodily health, enabling him to perform his duties intelligently; and that the fact was unknown to the Court, to the counsel on both sides, and to the prisoner, until after the verdict. Let a new trial be had in this case."

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* * * * *

The cases of *Powell v. Grimes*, 8 Ind. R. 252, *Leppar v. Enderton*, 9 id. 353, *Cronk v. Cole*, 10 id. 485, decide that this Court will be very reluctant to differ with the Court below and reverse its judgment where a new trial has been granted illegally. In the case of *Leppar v. Enderton*, a new trial was granted upon grounds repeatedly held by this Court to be insufficient, and yet this Court refused to reverse the judgment rendered upon the second verdict. The judge in this case, took especial pains to ascertain the incompetency of this juror, by a personal examination, entirely disregarding *ex parte* affidavits, and upon that examination, fully satisfied himself of that incompetency, and consequently, of the unfairness of the trial. The decision in *Powell v. Grimes*, is conclusive that this Court will not disturb this ruling, and thus impeach the intelligence and integrity of the judge who was not satisfied with the fairness of the first trial.

We, therefore, conclude that the Court committed no error in setting aside the first verdict and granting a new trial.

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BRANNENBURG v. THE INDIANAPOLIS, PITTSBURGH, AND
CLEVELAND RAILROAD COMPANY.

One substantive and complete cause of action arising out of the same tort, cannot be divided into several suits.

Thus, if A. have two horses killed by the cars of a railroad company, at the same time and place, and he sue and recover for the value of one of them, he cannot afterwards recover in an action for the value of the other.

APPEAL from the *Madison* Circuit Court.

Tuesday,
November 29.

HANNA, J.—This was an action, commenced before a justice of the peace, for the value of a mare killed by the cars, &c., of the company, at a place where the road was not fenced. Answer filed. Trial; and judgment for the plaintiff for 100 dollars. Defendants appealed to the Cir-

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cuit Court, where the plaintiff filed a demurrer to the first paragraph of the answer, which was overruled, and judgment for defendants.

The said paragraph is, in substance, that if the animal, &c., was injured, &c., it was at the same time and place at which another horse was injured, for which said plaintiff brought suit before said justice for 100 dollars, upon which issue was joined, and upon the trial judgment was recovered by said plaintiff against said defendants for 100 dollars, &c.

The question argued by counsel, is, whether the pleadings show but one trespass, and if so, whether a separate suit can be maintained for each animal killed.

We think the paragraph of the answer sufficiently avers, that at the same time and place, and by the same act, two horses of the plaintiff were killed by the cars of the defendants, and that the plaintiff had sued and recovered a judgment for the value of one of said animals.

We are of opinion that, under the circumstances disclosed in this case, the plaintiff could not bring a separate suit for each animal killed.

The suit was brought under the act of 1853, by the provisions of which it is not necessary to aver or prove negligence upon the part of the servants of the defendants, to entitle the plaintiff to recover—the road not being fenced.

It has been several times decided by this Court, that the jurisdiction of a justice, in like cases, does not exceed 100 dollars; and that the statute of 1853 had reference only to the mode of proceeding, and proof required, in cases before a justice. That in actions for property destroyed or injured, of a value greater than the jurisdiction of a justice, or rather where a sum beyond that jurisdiction was sought to be recovered, the common-law rule as to pleading and proof, still obtains.

If the answer is true, in the case at bar, the defendants, by the act complained of, destroyed property to a greater value than 100 dollars. If the plaintiff was permitted to bring two suits, he could, in those two suits, recover the full value of the property, without alleging or proving neg-

ligence. If, in seeking to recover the full value, he should be confined to one action, then the justice would have no jurisdiction to that amount, and he would be compelled to bring the suit in a tribunal governed by a different rule of pleading and practice.

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MILLIKEN.

It is not necessary for us to decide whether, in a case where the animals by one act destroyed are of a greater value than 100 dollars, the owner can abandon any attempt to recover except for a part, within the jurisdiction of a justice, or not. That point is not made, and cannot arise in this case. What we do decide, is, that one substantive and complete cause of action, arising out of the same tort, cannot be divided into several suits. If *A.* should shoot into a flock of sheep of *B.*, and kill half a dozen, we cannot think that half a dozen rights of action would thereby accrue to *B.*; he would be entitled to a recovery in one suit for the whole damage done, and if he failed to bring his action for the whole injury sustained, it would be his own fault. *White v. Mosely*, 8 Pick. 358.—*Smith v. Jones*, 15 Johns. 229.—*Farrington v. Payne*, *id.* 432.—Perk. Pr., p. 119.—*The Kalamazoo*, 9 Eng. Law and Eq. 558.

Per Curiam.—The judgment is affirmed with costs.

M. S. Robinson, for the appellant.

J. Davis, for the appellees.

VANCLEAVE and Others v. MILLIKEN.

Complaint to recover possession of land, averring that it belongs to the plaintiffs and is in possession of the defendant, and had been for six years. Answer, the statute of limitations, and that the land had been sold, by order of the Probate Court, by an administrator, &c., in 1834, under whom the defendant holds as a remote vendee, &c., and that the suit had not been commenced within five years after the confirmation by said Court of said sale, nor within twenty years after the cause of action accrued. Reply, that the plaintiffs were the only heirs, &c.; that they were not made parties to any application to sell the land, nor had they any notice thereof, wherefore the sale was void; that they were infants at the time of the sale, and until

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MILLIKEN.

the year 1845, and that the action was brought within twenty years after they arrived at full age. Demurrer sustained.

Held, that the pleadings show that the defendant, by virtue of the sale and conveyance by the administrator, confirmed by the Court, had been in possession six years, under color of title, and holding adversely to the plaintiffs; and hence the limitations of §§ 214, 215, 2 R. S. p. 75, are applicable.

Tuesday,
November 29.

APPEAL from the *Montgomery* Circuit Court.

HANNA, J.—Suit to recover the possession of land, and averment, in the complaint, that it belongs to the plaintiffs, and is in possession of the defendant, and had been for six years past.

Answer, statute of limitations, generally; and that the land had been sold by order of the Probate Court, by the administrator of the estate of the elder *Vancleave*, to one *Lane*, on the 12th day of *July*, 1834, under whom the defendant holds as a remote vendee, &c.; and that the suit had not been commenced within five years after the confirmation by said Court of said sale; nor within twenty years after the cause of action accrued.

Reply, that plaintiffs were the only heirs of the said *Vancleave*, deceased, and that they were not made parties to any application to sell said lands, nor had they any notice thereof, and that, therefore, said sale was void; that they were, at the time of said sale, infants, and so continued until the year 1845, and that said action was brought within twenty years after they arrived at full age.

Demurrer to the reply sustained.

This raises the only question in the case.

By a general statute, actions for the recovery of the possession of lands must be brought within twenty years. 2 R. S. p. 76. By another section, an action to recover lands sold by an administrator, upon a judgment directing such sale, brought by a party to the judgment, &c., must be so brought within five years after the sale is confirmed. *Id.*, p. 75. It is further provided (*id.*, § 215) that “any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed.”

The only question, in the case at bar, is, whether these

latter limitations are applicable herein, under the circumstances.

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It is insisted that the pleadings show that the whole proceedings of the Probate Court, upon the application to sell said lands by the administrator, were void, because the record in the said application to sell does not show that the heirs of the decedent, the present plaintiffs, were notified of the pendency of such proceedings; and that, therefore, the deed based upon those proceedings is a nullity; and that no such rights could be acquired, by virtue of said deed and possession held under the same, as would enable the defendant to avail himself of the limitations last above referred to.

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MILLIKEN.

The case of *Pillow v. Roberts*, 13 How. (U. S.) 472, is somewhat in point. That was an action of ejectment, in which the plaintiff relied upon a regular chain of title from the *United States* to himself. The defendant relied upon a tax title, and possession for more than five years under it. The Court passed upon the question of the admissibility of the tax collector's deed as evidence; but, also, held further, that, "assuming these deeds to be irregular and worthless, the Court erred in refusing to receive them in evidence, in connection with proof of possession, in order to establish a defense under the statute of limitations." That statute (of the state of *Arkansas*, where the land was situate), provided that "actions against the purchaser, &c., for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, shall be brought within five years after the date of such sales, and not after." It is held by the Court, in that case, that such statutes are statutes of repose, and that it is not necessary that he who claims their protection should have a good title; that such statutes would be of little use if they protect those only who could otherwise show an indefeasible title to the land; and, hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world.

In *Massachusetts*, it has been held, since the case of

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Marston v. Hobbs, 2 Mass. R. 439, that the actual possession of land under a claim of title, whether well founded or not, constitutes seizin. See 4 Mass. R. 408; *id.* 441; 17 *id.* 213; 5 Pick. 217; 6 Met. 439. Other states have, also, made decisions to the same effect, in some, and in others, having a strong tendency that way. *Collier v. Gambell*, 10 Mo. R. 472.—*Brookly v. Hathaway*, 20 Maine R. 255.—*Willard v. Twitchell*, 1 N. Hamp. R. 178.—3 Ohio R. 218.—10 *id.* 317.—17 *id.* 60.—21 Wend. 120.

In our own state, it has been decided that where there has been an unauthorized entry upon lands, the title must, of necessity, be limited to the lands over which visible authority has been exercised; but the Court say, "where a party is in possession, under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform sufficiently the office of color of title." *Bell v. Longworth*, 6 Ind. R. 277.

The only remaining point is, whether the pleadings sufficiently show possession for the time named, to-wit, five years after the confirmation of the sale, and two years after the plaintiffs arrived at age; or, if not, what is the effect of the statute, without reference to the question of possession?

Whether the defendant, or those under whom he claims, was in possession of said land from 1834, is not directly averred; but it is admitted, in the answer, that he is in possession by virtue of certain judicial proceedings and a deed of conveyance, all of which are matters of public record. He had been, by the plaintiffs' own showing, in possession for six years, and, according to the pleadings, in our opinion, in under color of title, and holding adversely to the plaintiffs. If the pleadings were silent as to the question of possession, for a length of time preceding the commencement of the suit, what presumption, if any, would have arisen as to that point, we need not decide, nor need we intimate what the decision would be in a case where neither party was in actual possession.

The appellants rely upon the case of *Doe v. Bowen*, 8 Ind. R. 197. In that case, no question was made as to limitation.

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The demurrer was properly sustained to the reply.

Per Curiam.—The judgment is affirmed with costs.

S. C. Willson and *J. E. McDonald*, for the appellants.

I. Naylor, for the appellee.



WRIGHT and Another v. HUGHES.

Suit upon a promissory note. One of the defendants, as treasurer of *The Logansport Insurance Company*, had drawn certain orders upon the company, in the similitude of bank notes, and intended for circulation as such, which were accepted by the secretary of the company. The following is a sample: "*Logansport Insurance Company*: Pay one dollar on demand to the bearer. *Logansport, May 1, 1850.*" The orders were circulated as money. The treasurer requested the plaintiff to redeem the orders, and promised to pay him the amount he might redeem. But when the plaintiff had redeemed orders to the amount of 800 dollars, the treasurer, not being prepared to pay, gave the note in suit. General verdict for the plaintiff, together with the following answers: "Question—'Was said note given at the date thereof, for and in consideration of the surrender, by the plaintiff to the defendant, of 800 dollars, the amount of the issues or circulation of the *Logansport Insurance Company*?' Answer—'Yes.' Question—'Was the issue of the currency of the *Logansport Insurance Company* fraudulent and void?' Answer—'Yes.' Question—'Did the plaintiff redcem and take up 800 dollars of the issues or circulation of said company, at the request of the defendant, and upon his promise to reimburse the plaintiff?' Answer—'Yes.'"

- Held*, 1. That the special findings are consistent with the general verdict, and the judgment right upon the facts stated, if the plaintiff could recover at all.
2. That the consideration of the note was legal, and the plaintiff was entitled to recover.

APPEAL from the *Cass* Court of Common Pleas.

Tuesday,
November 29.

WORDEN, J.—Suit by the appellee against the appellants on a note for 800 dollars. Trial; verdict and judgment for the plaintiff, over a motion, by defendants, for a new trial.

Two points, only, are made by counsel for appellants, for the reversal of the judgment, viz.:

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First. That the consideration of the note was illegal; and

Second. That the verdict was insufficient to warrant the judgment.

It appears by the evidence, that the appellant, *William L. Brown*, was the treasurer of the *Logansport Insurance Company*, and the principal manager of its affairs. He had drawn sundry orders upon the company for one, two, and five dollars, which orders had been accepted by the secretary of the company. The following is a sample of the orders, viz.:

"*Logansport Insurance Company*, pay one dollar on demand to the bearer. *Logansport, May 1, 1850.*

"Capital, \$100,000. *W. L. Brown.*

"Accepted, *D. M. Dunn, Secretary.*"

These orders were in circulation as money.

Before the making of the note sued on, *Brown* had requested the plaintiff below to redeem said orders, and promised to pay him whatever amount he should redeem. The plaintiff, who had no connection with the insurance company, upon the promise of said *Brown* to reimburse him, redeemed and took up the aforesaid orders to the amount of 800 dollars, and brought them to *Brown*, who, not being then prepared to pay the amount, gave the note in question, with *Wright* as surety.

The jury found a general verdict for the plaintiff, and also returned answers to numerous questions of fact propounded to them, and amongst others, the following:

"Question 1—Was said note given, at the date thereof, for and in consideration of the surrender, by the plaintiff to the defendant, *Brown*, of 800 dollars, the amount of the issues or circulation of the *Logansport Insurance Company*?

"Answer—Yes."

"Question 19—Was the issue of the currency of the *Logansport Insurance Company* fraudulent and void?

"Answer—Yes."

The appellants insist that the answers thus given, show such a state of facts as will not warrant a recovery, and

being inconsistent with the general verdict, that the judgment is erroneous. The jury, however, answered another interrogatory in such a manner as to materially modify and explain the answer first above given, as follows:

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“Question 5—Did the plaintiff redeem and take up 800 dollars of the issues or circulation of said company at the request of the defendant, *Brown*, and upon his promise to reimburse the plaintiff?

“Answer—Yes.”

The answers must be taken together, and thus taken, they show that the plaintiff was requested by *Brown*, to take up and redeem the paper, with a promise of reimbursement, and that, in pursuance of such request and promise, the plaintiff took up and redeemed the paper, and surrendered it to *Brown*, in consideration of which the note was given. These special findings are entirely consistent with the general verdict, and the judgment is right, if, upon the facts above stated, the plaintiff is entitled to recover at all.

This brings us to the question first raised by counsel, as to the legality of the consideration of the note.

From the evidence, it is apparent that the paper taken up and redeemed by the plaintiff, and more of the same character, was designed and intended to circulate, and to some extent did circulate, as bank bills. For the purposes of this case, we may assume that the charter of the company did not authorize the issuing, by the company, of any such paper. The paper, then, supposing it to have been that of the company, was void, and the company not liable therefor. *Smead v. The Indianapolis, &c., Railroad Co.*, 11 Ind. R. 104.

Notes issued by an unauthorized bank, are void, and the individual stockholders are not liable upon them. *Brown v. Killian*, 11 Ind. R. 449. Such notes are not a good consideration for a promissory note. *Skinner v. Deming*, 2 id. 558.

The paper in question, supposing it to be that of the *Logansport Insurance Company*, was, perhaps, void, and in itself, not a good consideration for a promissory note. But

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whether it was the paper of the company, or merely that of *Brown*, accepted by the company, we need not decide for the purposes of this case. *Brown*, to be sure, was treasurer of the company, and transacted its principal business; but the orders in question do not purport to be drawn by the company, but by *Brown*, and that without anything being stated on the face of the paper to show that he was acting for the company in thus drawing. The drawing of these orders seems to have been the individual act of *Brown*; and, according to the case of *M'Clure v. Bennett*, 1 Blackf. 189, might bind him, though the corporation had no authority to draw such paper. See, also, *Crum v. Boyd*, 9 Ind. R. 289, where it is held that "an agent who binds himself personally to pay, will be liable, although the consideration may move to his principal."

These orders were drawn upon, and accepted by the company, and although the acceptance might be void, as not being within the powers of the company, still *Brown* might be liable as drawer, if the drawing be considered his individual act. If, on the other hand, these orders be deemed to be drawn by the company, then they amount to promissory notes, being drawn by the company upon itself. *St. James' Church v. Moore*, 1 Ind. R. 289.—*The Marion, &c., Railroad Co. v. Dillon*, 7 id. 404.

It may be remarked, that at the time of drawing the orders in question, we had a statute providing "That all bills of any denomination whatever, hereafter to be issued by any individual or individuals, company or corporation, in this state, other than the *State Bank of Indiana*, either in the form of certificates or receipts for the deposit of money, or of promises to pay the bearer, or any specific person, any sum whatever, for the purpose of being used as a circulating medium, or as a substitute for bank notes, shall be deemed as fraudulent and void." R. S. 1843, p. 1042.

If the orders in question are not to be deemed as having been drawn by the company upon itself, and, therefore, equivalent to "promises to pay the bearer," it may be questionable whether they come within the terms of the stat-

ute, as they are not "in the form of certificates or receipts for the deposit of money."

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But we decide nothing upon this question, as the conclusion to which we have come renders it unnecessary. We place the case upon the assumed ground, that the orders were issued without authority, and in violation of law, and were fraudulent and void.

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The issuing and putting in circulation of the orders, if anything, constitutes the violation of law. It was certainly legal, and morally right, for the persons who made and put in circulation the paper in question, to redeem it. This was prohibited by no statute or rule of the common law. The persons who had perpetrated the fraud, by putting in circulation paper which they were not bound to pay, had the right, legally and morally, to remedy the wrong, by redeeming the paper. This they might do, either personally, or through the agency of others. *Brown's* name was attached to this paper as drawer, either personally, or on behalf of the company, and he had a right to redeem it, and for that purpose, to employ the plaintiff. The contract between them had no connection with the original violation of law, which was the issuing and putting in circulation of the orders. The fact that the plaintiff was redeeming the paper, might have given it additional credit and circulation, but that cannot render the redemption of it illegal. It is clear to our minds that there was nothing illegal in the redemption of the paper, or the contract between the plaintiff and *Brown* for that purpose, and, therefore, the consideration of the note was not illegal. This view is not only sustained by principle, but by very high authority.

The case of *Armstrong v. Toler*, 11 Wheat. 258, is in point. The action was assumpsit brought by *Toler* against *Armstrong*, to recover a sum of money paid by *Toler* on account of goods, the property of *Armstrong* and others, consigned to *Toler*, which had been seized and libelled in the District Court of *Maine*, in the year 1814, as having been imported contrary to law. The goods were shipped during the late war with *Great Britain*, at *St. Johns*, for

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Armstrong and other citizens of the *United States*, and consigned to *Toler*, who was a domiciled citizen of the *United States*. The goods were delivered to the agent of the claimants, on stipulation to abide the event of the suit, *Toler* becoming liable for the appraised value; and *Armstrong's* part of the goods were afterwards delivered to him on his promise to pay *Toler* his proportion of any sum for which *Toler* might be liable, should the goods be condemned. The goods having been condemned, *Toler* paid their appraised value, and brought this action to recover back from *Armstrong* his proportion of the amount. At the trial below, the defendant resisted the demand, on the principle that the contract was void, as having been made on an illegal consideration. The plaintiff recovered, and the judgment was affirmed by the Supreme Court. Chief Justice MARSHALL, in delivering the opinion of the Court, said:

“Questions upon illegal contracts have arisen very often, both in *England* and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and many decisions have been made. In *Falkney v. Reynons*, 4 Burr. 2069, the plaintiff and one *Richardson* were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by the plaintiffs; and a bond was given to secure the repayment of *Richardson's* proportion of the loss. To a suit on this bond, the defendants pleaded the statute prohibiting the original transaction, but the Court held on demurrer that the plaintiff was entitled to recover. Although this was the case of a bond, the judgment does not appear to have turned on that circumstance. Lord MANSFIELD gave his opinion on the general ground, that if one person apply to another to pay his debt (whether contracted on the score of usury

or for any other purpose), he is entitled to recover it back again. This is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a Court of justice. * * * *

In the case of *Petrie v. Hanway*, 3 T. R. 418, the testator of the plaintiffs was engaged with the defendant and others in stock transactions, which were forbidden by law, on which considerable losses had been sustained, which were paid by *Portis*, their broker. *Keeble* repaid the broker the whole sum advanced by him except £84, which was, in part, the defendant's share of the loss, for which *Keeble* drew a bill on the defendant, which was accepted. The bill not being paid, a suit was brought upon it by *Portis* against the executors of *Keeble*, and judgment was obtained, they not setting up the illegal consideration. The executors brought this action to recover the money they had paid, and it was held, by three judges against one, on the authority of *Falkney v. Reynons*, that the plaintiffs could maintain their action. A distinction was taken in cases where money was paid by one person for another, for an illegal transaction, by which the parties were not bound; between a voluntary payment, and one made on the request of the party; between an assumpsit raised by operation of law, and an express assumpsit. Although the former would not support the action, it was held that the latter would. This, also, is a strong case to show that a new contract, by which money is advanced at the request of another, or, which is the same thing, where there is an express promise to pay, may sustain an action, although the money was advanced to satisfy an illegal claim. In *Farmer v. Russell*, 1 B. and P. 295, it was held that if *A.* is indebted to *B.* on a contract forbidden by law, and pays the money to *C.* for the use of *B.*, a Court will give judgment in favor of *B.* against *C.* for this money. In this case, *B.* could not have recovered against *A.*; but when the money came into the hands of *C.*, a new promise was raised on a new consideration, which was not infected by the vice of the original contract. In this case, Chief

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Justice EYRE said that the plaintiff's demand arose simply from the circumstance that money was put into the hands of *C.* for his use; and Justice BULLER said that the action did not arise on the ground of the illegal contract. Yet, in this case, *A.*'s original title to the money was founded on an unlawful contract, and he could not have maintained an action against *B.* The general proposition stated by Lord MANSFIELD, in *Falkney v. Reynons*, that if one person pay the debt of another, at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the Court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The case of *Armstrong v. Toler*, and the authorities therein cited, establish the legality of the consideration of the note sued upon in the case at bar, and also its sufficiency. Had the orders been redeemed by the plaintiff, without a previous request or promise of reimbursement, perhaps the surrender of them would not have been a sufficient consideration for the note. In such case, there would have been a mere moral obligation, which, without some precedent good consideration, is not sufficient to sustain an express promise. *Wiggins v. Keizer*, 6 Ind. R. 252. But such was not the case. The plaintiff, at the request of *Brown*, and upon his promise of reimbursement, redeemed the orders.

The case falls within another principle decided in *Wiggins v. Keizer, supra*. It was there held that the father of a bastard child is not (without an order of filiation) liable for its support, and that a promise by such father to pay for the past support of such child is not binding, but that a promise for the future support of such child is based upon a sufficient consideration and binding. So here, the orders having been redeemed in pursuance of a previous request and promise of reimbursement, such promise was valid and binding, and afforded a sufficient consideration for the note. Had the note not been given, an action might have been maintained on the agreement for the

money expended in the redemption of the orders. "Where money has been paid at the request of the defendant, either express or implied, it may be recovered as money paid to the use of the defendant, though paid in satisfaction of a claim against the defendant which could not have been enforced at law." Chit. on Cont., 594. See, also, *Pawle v. Gunn*, 4 Bing. (N. C.) 448.

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We are of opinion that the judgment is right, and it must, therefore, be affirmed.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

H. P. Biddle and *B. W. Peters*, for the appellants.

D. D. Pratt, for the appellee.

SCOBEY v. ROSS.

An agreement by which an attorney is to receive for his services in recovering a claim, a part of the claim or thing to be recovered, is champertous and void.

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APPEAL from the *Decatur* Court of Common Pleas.

Tuesday,
November 29.

WORDEN, J.—Complaint by the appellant against the appellee, upon the following instrument, viz.:

"*Greensburgh, Indiana, September 21, 1846.*

"I, *Nancy Cole*, alias *Nancy Ross*, have employed *Charles H. Test* and *J. S. Scobey*, as attorneys to collect a judgment rendered by the judges of the *Decatur* Circuit Court, in chancery sitting, in my favor against *John Ross*, in a suit for divorce, for 500 dollars, and I agree to pay said *Test* and *Scobey* 150 dollars of said judgment for their services, when they shall collect the same.

[Signed]

"*Nancy Ross*,

his

"by *William X Cole*."
mark.

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Demurrer sustained to the complaint, and exception taken.

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The only question raised in the case, is, whether the instrument is valid; or void on the ground of champerty.

We have, perhaps, never had, in this state, any statute on the subject of champerty and maintenance; but the common law, and the *English* statutes on that subject, have prevailed here since the year 1818. *Vide* R. S. 1843, p. 1030. Also, 1 R. S. p. 352.

There is some discrepancy between authors, as to the exact definition of champerty. *Blackstone* defines it as follows, viz.: "Champerty, *campi partitio*, a species of maintenance, and punishable in the same manner, being a bargain with a plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the suit at his own expense." 4 Blacks. Comm. 135. Other authors adopt substantially the same definition. According to this definition, the instrument sued upon is not champertous, there being no agreement on the part of *Test* and *Scobey*, to carry on any suit that might be necessary in the collection of the judgment mentioned, at their own expense. But other elementary writers give a definition not embracing the idea, that to constitute the offense, it is necessary that there should be an agreement to carry on the suit at the expense of the champetor. The remarks of the Court in the case of *Lathrop v. The Amhurst Bank*, 9 Met. 489, are appropriate here. "It was suggested," says DEWEY, J., "in the argument, that the facts here shown do not bring the case strictly within the definition of champerty, as the plaintiff was not to conduct the suit wholly at his own expense, but was, in the event of a failure to sustain the action, to be remunerated for his actual expenses. It is true that some of the elementary books, in defining champerty, say that 'the champertor is to carry on the suit at his own expense;' as 4 Blacks. Comm. 135; Chit. on Cont. (5th Am. ed.) 675. Other books of equal authority omit this part of the definition of champerty; as 1 Hawk., ch. 84, § 1; Coke Lit. 368, b."

In *Stanley v. Jones*, 7 Bing. 369, it was said by TINDAL, C. J., that, "The offense of champerty is defined in the old books, to be the unlawful maintenance of a suit, in consideration of some bargain to have a part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offense pregnant with great mischief to the public, is evident, from the provisions made by our own law, in the statutes of *Westminster*, first and second, and from the language of the civil law, which was afterwards received as the law over the greater part of the continent."

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In *Sedgwick v. Stanton*, 4 Kern. 289, the above definition is, in substance, adopted from *Hawkins*, with the additional remark that "The gist of the offense, therefore, consists in the mode of compensation, irrespective of the particular manner in which the suit is to be maintained, because all maintenance of a suit by a stranger, was, at common law, unlawful."

The cases hereinafter cited, abundantly establish the proposition that a contract may be champertous and void, although there be no stipulation as to the expenses of the suit.

The contract in question, was one by which *Test* and *Scobey* were to be paid for their services in collecting the judgment (whether by execution, suit in chancery, or otherwise), 150 dollars of the judgment to be collected, and the adjudicated cases establish that such a contract is void.

In note *a*, 4 Kent's Comm., 8th ed., p. 449, it is said that "the ancient *English* statutes under Edw. I., reached attorneys as well as others. They reached equally officers and individuals; *nulle ministre de roi, ne nul autre*, was permitted to take upon him any business in suit in any Court, or to have a part of the thing or plea in demand. Every agreement relating thereto was declared void."

In *Holloway v. Lowe*, 9 Porter (Ala. R.), 488, the following agreement was held void as being champertous:

"*William Holloway, sen. v. Joel Chandler.*

"In this case of slander, I agree to pay *P. P. Lowe* fifteen dollars for commencing and prosecuting the suit, to-

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gether with one-fourth of the damages; but if the said *Lowe* is non-suited in the action for any informality in the pleadings, he is not to have anything. This 26th of *February*, 1834.

[Signed]

"*William Holloway.*"

This case was decided upon the common law. The Court say: "The reason of the rule of the common law is, that every suit or action should stand on its own merits, and that those who have no interest in the matter or thing in dispute, shall never be permitted to become interested, as thereby law-suits would be greatly multiplied, and much injustice frequently wrought by interposing other than the real parties, who, from their influence in society, or other cause, may be able to produce a result which could not be effected by the real parties. Although this reason may be less forcible now than in former times, it is impossible to say that it is destitute of weight. Times are not so entirely changed, that the aid and active personal interference and interest of one possessing influence, may not produce a very different result, in many suits, from that which the parties to it could do."

In *Evans v. Bell*, 6 Dana, 479, *Bell* had brought an action for slander, and had employed *Evans* as his attorney to conduct the suit, and agreed to pay him for his services a sum equal to one-tenth of the amount of damages that might be recovered. This was held valid, but the decision was placed upon the ground that the sum to be paid was not to be out of the damages to be recovered. The Court say: "The covenant is not champertous from anything apparent on its face. It does not import an undertaking to give any part or parcel of the thing in suit, or of the damages sought to be recovered, but is an obligation to pay a contingent fee, made dependent on a recovery, and to be regulated, in amount, by the amount recovered." It is evident that had the agreement been to pay one-tenth of the sum to be recovered, it would have been held champertous and void.

In *Thurston v. Percival*, 1 Pick. 415, an attorney was employed to aid in the recovery of a sum of money, for

which he was to receive ten per cent. upon the sum to be recovered. This contract was held void, as being champertous at common law.

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So, in *Lathrop v. The Amherst Bank, supra*, it was held that an agreement between *A.* and *B.*, that *B.*, shall prosecute and manage *A.*'s suit at law, as *A.*'s agent, and that he shall receive for his services a certain per cent. on the amount that shall be recovered, and that if he does not recover, *A.* shall pay him no more than his actual expenses, amounts to champerty, and is so far illegal and void that *B.*, after obtaining judgment for *A.* cannot maintain an action on the agreement. The Court say: "The contract upon which the plaintiff seeks to recover was illegal, being in violation of the principles of law in reference to maintenance and champerty. Such agreement for a proportionate share of the fruits of litigation, as a consideration for services rendered in conducting and prosecuting with success, a suit at law, where the party has no interest, legal or equitable, and no claim or expectancy, even remotely contingent, has been deemed contrary to public policy, and proscribed by statutes and the common law. The statutes of 3d and 13th Edw. I., related to officers of the king, but the provisions were further extended and made applicable to other persons by statute 28, Edw. I."

The rule is the same in *New York*. Thus, in *Merritt v. Lambert*, 10 Paige, 352, it was held that an attorney, solicitor, or counsel, could not, previous to the determination of the suit, contract with his client for a part of the demand or subject-matter of litigation, as a compensation for his services. This case, by the name of *Wallis v. Loubat*, was affirmed in 2 Denio, 607. So, also, in *Satterlee v. Frazier*, 2 Sandf. S. C. R. 141, it was held that an agreement, by a party having a demand against an estate, by which he employed an attorney to collect it, and was to pay him one-half of the claim for his services in collecting it, or procuring it to be paid, was champertous and void. In the case last cited, as well as in *Sedgwick v. Stanton, supra*, it was said that the code of procedure of *New York* had changed the law in this respect, so that parties could

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make such bargains with their attorneys as they pleased. It is unnecessary to inquire whether our code has effected any such change, as the contract in question was made before the code was enacted, as was the case in *Satterlee v. Frazier*. It may be remarked, however, that in *New York*, the *English* statutes on this subject are not now considered in force, while in this state they are continued, unless inconsistent with our own laws. *Vide* R. S. 1852, *supra*.

The foregoing authorities, we think, fully establish the proposition that an agreement by which an attorney is to receive for his services in recovering a claim, a part of the thing or claim to be recovered, is void, and that no action can be maintained thereon.

We will examine the authorities cited on the other side, and see how far they militate against the above doctrine.

In *Key v. Vattier*, 1 Ham. 132, it was held that a contract with an attorney, that he shall prosecute suits for the recovery of property, and that no compromise shall be made except he join in it—to receive a part of the property recovered as a compensation—was illegal and void.

In *Weakly v. Hall*, 13 Ohio R. 167, *Hall* was indebted to *Weakly* in a claim of many years standing. *Weakly* assigned the claim to one *Bell*, not a lawyer, who agreed to collect it in *Weakly's* name, to employ counsel, advance money, procure bail, &c., and reimburse himself from the proceeds when collected, and receive a part of the avails for his compensation. This contract was held champertous and void.

It is admitted by the appellant that these cases show such a state of facts as amount to champerty. But it is claimed that they differ materially from the case at bar. The principal difference consists, perhaps, in this, that in the one case there was a stipulation that the suit should not be compromised unless the attorney should join in it; and in the other, that *Bell* should advance money, &c.; while in the case at bar there is no such stipulation. The cases, we think, are not in conflict with those cited from other states, although it might, perhaps, be inferred from

the observations of the Court, in each case, that something more was necessary to make a contract champertous than a stipulation for compensation out of the proceeds of the suit.

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The case of *Spencer v. King*, 5 Ham. 183, is cited, but it does not appear to be in point. No question was raised in the case as to the validity of the contract on the ground of champerty, but had there been, the contract would probably have been held good. It was a contract by which the attorney was to receive a conditional fee, dependent upon success in the suit, but it contained no stipulation for payment out of the avails of the suit. It was much like the case of *Evans v. Bell*, *supra*, from *Kentucky*, except that the amount to be paid did not depend upon the amount to be recovered, the subject to be recovered being real estate.

Call v. Calef, 13 Met. 362, is also cited, but is not at all in point. The case was this. *Leeds & Co.* claimed to have an interest in the exclusive use of a patent planing machine in the town of *Manchester, New Hampshire*, in which town *Baldwin* and *Stevens* were working the same machine, as *Leeds & Co.* alleged, without right. *Call*, the plaintiff, had an interest in the same patent at *Lowell*. *Leeds & Co.* executed a power of attorney to *Call*, the plaintiff, authorizing him, by suit or otherwise, to restrain *Baldwin* and *Stevens* from using the machine at *Manchester*, and promised him half of what he should recover or receive for his compensation. This contract was held not to be champertous; but the decision is placed entirely upon the ground that the plaintiff had an interest in the patent right which authorized the contract. The Court say: "*Manchester* and *Lowell* were towns near each other; and the unauthorized use of the patent right in one, would diminish the value and profits of the patent in the other. Therefore, the plaintiff had a direct interest, concurrent with that of *Leeds & Co.*, in preventing a violation of the patent right, so that an agreement to act in the name of the patentee, or his assigns, to prevent such violation, and bring suits if necessary for that purpose, in the benefit of

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which he would largely, though indirectly, share, was not such an unlawful maintenance or champerty as to render the agreement void."

In the case of *Ramsey v. Trent*, 10 B. Mon. 336, it was held that a contract to pay counsel a fee equal to one-fourth of the value of the land that might be recovered, less the costs of the suit, and to wait until the land should be sold, was not champertous. This was placed upon the ground that the agreement was not to give "part or profit out of the thing in contest." "The reference to one-fourth of the value of the land is only for the purpose of measuring or ascertaining the fee." It is not perceived that this case is substantially in conflict with those hereinbefore cited.

Byrd v. Odem, 9 Ala. R. 755, is the only remaining case cited by the appellant, and it is relied upon by both parties. In this case, the complainant was the proprietor of a note, but being unwilling to put the same in suit, requested the defendant to sue thereon in his own name, and in consideration thereof agreed to allow the defendant one-half of the sum he might be able to collect thereon. This contract was held champertous and void. Nothing is perceived in this, either in the point decided, or the remarks of the Court, that tends to sustain the validity of the contract in the case at bar.

The demurrer to the complaint, we think, was correctly sustained, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

J. S. Scobey, in person.

J. Gavin and *O. B. Hord*, for the appellee.

GIBSON v. ELLER, Executrix, and Others.

A sale and conveyance of land, with the agreement that the vendor should hold possession and use the property until the vendee sold it, covenanting

to then give up the premises in as good repair as when the vendee purchased them, upon the payment of a balance of the purchase-money, was held to be absolute; and the agreement was held to be, in effect, a mortgage to secure the balance of the purchase-money.

The failure of the vendee, in such case, to pay the purchase-money within a reasonable time, would authorize a foreclosure against him.

And where damage to an amount equal to the purchase-money due, occurs to premises so held by a vendor, through his negligence or misconduct, the vendee may have an accounting with the vendor, and have his title quieted, without alleging a tender of the purchase-money. It will be sufficient if the complaint contain an offer to pay what may be found due the vendor.

Where buildings upon premises so held by a vendor, are destroyed by fire, through his negligence or misconduct, he must rebuild them; otherwise the vendee will be entitled to a deduction from the purchase-money of an amount equal to the cost of rebuilding.

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APPEAL from the *St. Joseph* Circuit Court.

Tuesday,
November 29.

DAVISON, J.—This was an action instituted in the Circuit Court by *Gibson*, the appellant. The appellees, who were the defendants, demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. Their demurrer was sustained, and final judgment accordingly rendered, &c.

The following is the case made by the complaint:

Jacob Eller, in his lifetime, owned forty acres of land in *St. Joseph* county, upon which there was a large two-story building and outhouses, &c. These buildings were occupied by *Eller* and his family as a country tavern, were of more than three-fourths the value of the whole premises, and were insured in the name and for the benefit of *Eller*, to the amount of 1,200 dollars, in the *Jackson Insurance Company*.

On the 8th of *September*, 1851, *Eller*, for the consideration of 1,500 dollars, to be paid at a future day, sold, and, by deed in fee simple, conveyed the same land to *Gibson*. In reference to the sale and conveyance thus made, the parties, at the above date, entered into a written agreement, whereby it is stipulated that *Eller* should have the use of the property until *Gibson* sold it; then *Gibson* was to pay the said 1,500 dollars, and immediately thereupon *Eller* should give up possession of the premises in as good condition as the same then were, natural wear excepted.

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Eller was to pay all the taxes and insurance, till *Gibson* should make sale of the property, and having made such sale, he was to assume or discharge *Eller's* liability to the insurance company. *Eller* was to be permitted to use, occupy, or rent the premises, until *Gibson* should sell them, and no longer, and for that reason, was to receive no interest on the 1,500 dollars. And further, it was declared that the agreement itself should operate as a mortgage on the premises for the purpose of securing the purchase-money. *Eller* continued, under this agreement, to occupy the premises until the buildings, through his carelessness, negligence, and misconduct, were destroyed by fire. They have never been rebuilt; and he has recovered a judgment in the *St. Joseph* Circuit Court, upon said policy of insurance, for the loss occasioned by their destruction. In *January*, 1856, *Gibson*, the plaintiff, sold and conveyed the property to one *John Ruple*; but cannot recover the purchase-money until he delivers to the vendee possession of the premises free from the incumbrance of the mortgage. Plaintiff has requested *Eller*, in his lifetime, and the defendants, since his death, to put the premises in as good repair as they were in when he, plaintiff, bought them, and to deliver possession thereof on receiving the 1,500 dollars, or to come to an account with the plaintiff and ascertain what, if anything, was due, after deducting the amount required to replace the buildings. It is averred that these requests have been refused, and that after deducting the amount necessary to rebuild and place the premises in repair, &c., there is nothing due to the defendants.

The prayer is, that the defendants may be compelled to account with the plaintiff respecting the premises, and if anything is found due upon the mortgage, that he may redeem; that the mortgage, if nothing be found due, be canceled, and the defendants compelled to deliver up possession of the premises, &c.; and for general relief, &c.

The appellees, in support of the demurrer, argue thus: "The arrangement, taken together, amounted, at most, to a written proposition by *Eller* to sell the land to *Gibson* at a fixed price. *Gibson* held the land in trust for *Eller*,

and had no further interest than a right to buy it if he saw fit. Had a time been named within which he was bound to exercise his option, the contract would have been at an end within the expiration of that time. As no such time was fixed by the parties, the law fixes a reasonable time. The contract was entered into *September 8, 1851*, and *Gibson* sold to *Ruple*, in *January, 1856*. He had thus slept on his rights, whatever they were, for more than five years, which was an unreasonable delay."

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This reasoning seems to be incorrect. There was an unconditional sale and conveyance of the land to *Gibson*; and the agreement was, in effect, what the parties intended—a mortgage to secure the payment of the purchase-money—though it stipulated that the vendor should hold possession and use the property, until the vendee sold it. Suppose, then, the delay attributed to the vendee to have been unreasonable, still it would not affect his title. Had the contract of sale remained executory, the result might have been different; but as the case stands, his failure to comply with the agreement within a reasonable time, would have simply authorized a foreclosure against him.

The appellees assume another ground. They insist that the complaint is defective, because it fails to allege a tender of the purchase-money. This position does not strictly apply to the case before us. The demurrer admits that the buildings were destroyed through the carelessness, negligence, and misconduct of the vendor; and that, after deducting the amount necessary to rebuild and put the premises in repair, &c., there would be nothing due to the defendants. Now if the facts thus admitted are well pleaded, they will entitle the vendee to an account with the defendants, and to have his title quieted, without alleging a tender of the purchase-money; because, there being nothing due, a tender could not be deemed an essential element in the case. The complaint, however, does contain an offer to pay such sum as may be found due, &c., and that, in view of the case which it makes, is, no doubt, sufficient. 2 Hill. on Mort. 153.—*Green v. Tanner*, 8 Met. 411.—*Stapp v. Phelps*, 7 Dana, 300.

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But the main question to settle is, was the vendor bound to replace the buildings? If he was, he having failed to do so, the plaintiff has evidently a right in this action to have a deduction from the purchase-money of an amount equal to the cost of rebuilding. The agreement stipulates that *Eller* was to have the use of the property until *Gibson* sold it. Then *Gibson* was to pay the 1,500 dollars; and immediately thereupon, *Eller* should give up possession of the premises in as good a condition as the same were then in, natural wear excepted. This stipulation, literally construed, would bind the vendor—the buildings having been destroyed while in his possession—to rebuild them; but it is insisted that such a construction would not meet the intent of the parties, as manifested by looking into the whole instrument, and that in the absence of an express covenant to repair, the vendor was not bound to put up new buildings in place of those destroyed. This construction would be correct in its application to the case before us, had the buildings been consumed accidentally; but here, it is averred in the complaint, and admitted by the demurrer, that they were burnt down through the carelessness, negligence, and misconduct of the vendor.

We are referred to *Warner v. Hutchins*, 5 Barb. 666, which was covenant upon a lease. There, the lessee agreed to surrender up the premises at the expiration of the term, in as good a condition as they were in at the date of the lease, natural wear excepted. While in the lessee's possession, the buildings on the premises were destroyed by accidental fire. *Held*, there being no covenant to repair or rebuild, that the lessee was not bound to replace the buildings. This decision, it will be seen, is not an available authority; because, in the case at bar, the destruction of the buildings was not the result of accident. In *Warner v. Hutchins*, *supra*, the Court, in their opinion, say: "The stipulation to repair is the proper one, where the lessee assumes to keep and make the premises good, from whatever cause the injury may arise, whether from unavoidable accident or negligence. And the covenant to surrender in the same condition, is adopted when the object is to secure

the utmost care and diligence of the lessee, in protecting and preserving the property." The exposition thus made, is sustained by authority, and when applied in the construction of the agreement before us, decides the case against the defendants; because the record plainly shows that the destruction of the buildings was occasioned not only by want of care and diligence on the part of the vendor, but through his misconduct. *Cook v. The Champlain, &c., Co.*, 1 Denio, 91.—*Maggart v. Hansbarger*, 8 Leigh, 532.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. G. Deavitt and J. A. Liston, for the appellant.

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A writ of attachment is a lien upon property of the attachment-defendant, from the time it is placed in the sheriff's hands.

The claims of other creditors filed under an attachment suit, are, under our statute, liens from the time the original writ was placed in the hands of the sheriff, and take priority of judgments rendered after the sheriff receives the writ, even where such judgments were rendered before the filing of such claims.

The finding of a jury that an attachment-defendant, at the time the writ issued, had sold and transferred his property with intent to hinder and delay his creditors, is not sufficient to authorize a sale without appraisement, unless it be followed by an order by the Court to that effect.

As a general rule, a verdict is not effective for any purpose, unless followed by an adjudication of the Court.

But if in an attachment suit judgment be rendered in favor of several claimants, and several executions are issued against the same property, some of them collectable without appraisement, a sale without appraisement, or for less than two-thirds of the appraised value, will be held valid; for in such cases, the sale must be upon all the executions at once—no one of the judgments having priority.

APPEAL from the *Miami* Circuit Court.

Tuesday,
November 29.

DAVISON, J.—*Shirk* brought this action against *Wilson* to recover certain real property described thus: twenty-four

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feet off the south end of lot No. 36, in the town of *Peru*, in *Miami* county. The Court tried the issues, and found for the defendant, and having refused a new trial, rendered judgment, &c.

The case is this: On the first of *January*, 1855, three several judgments, each against *Philo Reed*, *Alvin Thayer*, and *William H. Constant*, were rendered in the *Miami* Court of Common Pleas, viz.: one judgment in favor of *John R. Neff* for 380 dollars, one in favor of *Isaac Walker* for 706 dollars, and one in favor of *John H. Constant* for 776 dollars. These judgments were collectable without relief, &c., and upon them executions were issued and levied on the premises in contest, which were, on the 29th of *August*, 1855, sold by the sheriff to the plaintiff, who received a deed pursuant to the sale. Under this deed he claims title.

In *October*, 1854, and prior to the rendition of the judgments to which we have referred; a writ of attachment, at the suit of *White & Co.*, was duly issued from the *Miami* Circuit Court against the said *Reed*, *Thayer*, and *Constant*, wherein it is alleged that they, the defendants, are indebted to *White & Co.* 609 dollars. This writ was placed in the hands of the sheriff, *October* 16, 1854. After this, in the same month, another writ of attachment, at the suit of *Cochran & Co.*, was issued from said Court against the same defendants, alleging therein that they are indebted to *Cochran & Co.* 523 dollars. The last-named writ went into the sheriff's hands *November* 21, 1854. Both writs were, on the 30th of *December*, in that year, levied upon the premises in controversy, with other real estate amounting, by appraisement, to 7,100 dollars. Also, on the 3d of *January*, 1855, they were levied upon personal property which was appraised at 1,443 dollars; and on the 10th of *March* in the same year, upon real estate appraised at 7,000 dollars. The premises in suit were valued by appraisement at 2,500 dollars. On the 16th of *February*, 1855, after the rendition of the above judgments, others, creditors of the attachment-defendants, with a view of becoming parties to the attachment suits, filed their respec-

tive claims against the defendants in said Court, in the mode prescribed by the statute. At the *March* term, 1855, judgments were rendered in the original attachment suits, and, also, upon the claims filed under them as follows:

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Judgment in favor of <i>White & Co.</i> , for.....	\$422 62
Judgment in favor of <i>Cochran & Co.</i> , for.,.....	354 35
Judgment in favor of <i>Hope, Gradon & Co.</i> , for..	1,354 09
Judgment in favor of <i>Arbuckle and Moore</i> , for..	173 00
Judgment in favor of <i>Henry Cunningham</i> , for...	434 00
Judgment in favor of <i>Norton and Jewet</i> , for.....	154 34
Judgment in favor of <i>Atwood, Burns, and Farmer</i> , for.....	307 00

The judgment in favor of *White & Co.*, as also the one in favor of *Cochran & Co.*, do not order the property levied on to be sold without appraisement. The other judgments contain such order. A jury impaneled in one of the attachment suits found that the defendants, at the time the several writs of attachment were issued, had sold and transferred the same property with the fraudulent intent of hindering and delaying their creditors.

Executions were duly issued on all the judgments in the attachment suits, and upon them the property in dispute was, on the 16th of *February*, 1856, sold by the sheriff, without appraisement, to the defendant for 500 dollars, that sum being less than two-thirds its appraised value. Pursuant to this sale, the defendant received a sheriff's deed, under which he claims title.

The judgments upon which the plaintiff rests his title were rendered *January* 1, 1855, and were, at their date, liens on the property sold, and the sale to him under them was regular and legal. He was, therefore, entitled to recover in this action, unless the defendant has shown a valid sale of the premises to himself, in virtue of a prior lien. Has he done so?

As we have seen, the writs of attachment were placed in the sheriff's hands *November* 25, 1854, and it must be conceded that they, at that date, became liens on the property. 2 R. S. p. 66, § 165. But the claims of other creditors, under the original attachment suits, were not filed

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until *February*, 1855. Hence, it is insisted that these claims could be deemed liens only from the time they were filed, and that, as to them, the judgments rendered on the first of *January* are prior liens.

The statute says, "Any creditor of the attachment-defendant, upon filing his affidavit, &c., may, at any time before the final adjudication of the suit, become a party to the action, file his complaint, and prove his demand against the defendant." And that "the money realized from the attachment shall, under the direction of the Court, after paying all costs, &c., be paid to the several creditors, in proportion to the amount of their several claims as adjusted." *Id.*, pp. 70, 71, §§ 186, 192.

This enactment evidently places all the creditors before the Court, at the final adjudication of the attachment suit, whose claims have been adjusted, upon an equal footing; and, further, it makes all of them parties to the original proceeding. This could not be, unless the original attaching process creates a lien upon the property attached, not only for the amount of the debt for which it was issued, but also for all valid demands that may be thereafter filed under such process. We have been referred to *Zeigener v. Doe*, 1 Ind. R. 296; but that decision was made in reference to the attachment law of 1843, and that law did not authorize a creditor who had filed his demand subsequently to the commencement of the attachment suit, to become a party to the action. R. S. 1843, p. 768, § 25. Moreover, the Court, in the case cited, expressly withheld an opinion in regard to the question, "whether the lien of subsequent claims relates back to the levying of the attachment." As the attaching process, in this case, was in the hands of the sheriff before the date of the judgments relied on by the plaintiff, it seems to us that these judgments cannot be regarded liens prior to that of any creditor whose claim was adjusted in the attachment suit.

The appellant, however, assumes another ground. He says that the sale to the appellee—the sheriff having sold the property for less than two-thirds its appraised value—was a nullity. While on the other hand, it is contended

that the sheriff had the right to sell without regard to the appraisement, for the reason that the jury had found that the defendants, at the time the writs of attachment issued, had sold and transferred the property with intent to hinder and delay their creditors. It is enacted that property thus transferred shall be sold without appraisement. But it is also enacted that "when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment." 2 R. S. pp. 123, 138. §§ 381, 456. It seems to follow that the verdict of a jury alone, is not sufficient to establish such fraudulent intent. Indeed, a verdict will not, generally speaking, be held effective for any purpose, unless followed by an adjudication of the Court. In *Doe v. Craft*, 2 Ind. R. 359, it was held that a sheriff's sale made without appraisement, where the judgment did not so direct, was void. The verdict, as it stands in the record, is not operative for any purpose. But in the case before us, there were seven executions. Two of them were issued upon judgments in which there was no order directing a sale without appraisement, and which were in favor of the original attaching plaintiffs, and founded on claims which did not waive the appraisement laws. The property was sold on all the executions, for less than two-thirds the appraised value. Can this sale be sustained?

In *Harrison v. Stipp*, 8 Blackf. 455, it was held that "Where a sheriff has in his hands several executions (the laws as to a sale under them being different), and the real estate levied on is divisible, he should commence with the execution first to be satisfied, and sell enough of the property, under the law governing such sale, to satisfy that execution; and that he should afterwards sell under the other executions, in their order, according to the same rule, until all are satisfied, or the property exhausted. But if the property is not susceptible of division, the same should be sold under the execution first to be satisfied."

This decision is cited in argument, but it is not an authority in point, because, in the case at bar, the judgments in attachment have no priority to each other, and out of the proceeds of the sale of the property attached, they are

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to be paid in the proportion of their several amounts; and the result seems to be, that the sheriff, in this instance, was bound to sell on all the executions at the same time; otherwise the attachment law, under which the proceedings were instituted, could not be executed in accordance with the intent of the legislature. He might, it is true, have conducted the sale in reference to the appraisement laws; still, it must be conceded that the plaintiffs, whose judgments contained the order directing a sale without appraisement, had rights proper to be subserved; and it seems to us that a sale consistent with those rights would not, in view of the case made by the record, conflict with any prescribed duty of the sheriff, and ought to be sustained.

There is, however, a fatal error in the record. The plaintiff sued for, and, in support of his action, showed a *prima facie* title to, twenty-four feet off the south end of lot 36, in the town of *Peru*; while the defendant, in his defense, proved title to nineteen feet only off the south end of the same lot. The plaintiff was, therefore, under the evidence, entitled to recover five feet of the premises in contest. Hence, the verdict is not sustained by the evidence. It should have been in his favor for that portion of the south end of lot 36 not covered by the defendant's title. For this error, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. J. Shirk, N. O. Ross, and R. P. Effinger, for the appellant.

J. Caven, for the appellee.

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125	543

BOGERT v. THE CITY OF INDIANAPOLIS.

The charter of the city of *Indianapolis* does not empower the city council to subject to the control of the city sexton cemeteries other than those belonging to the city.

PARKINS, J.—The bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. But as they cannot be permitted to create a nuisance by them, they may be required, where population is dense, to bury them at a certain depth, or outside of where the population is dense, or likely to become so, and within a reasonable time after death, &c., but, it seems, that the burial cannot be taken out of their hands—they being able and willing to perform it.

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APPEAL from the *Marion* Court of Common Pleas.

Wednesday,
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PERKINS, J.—Suit by the city of *Indianapolis* against *Charles Bogert*, charging him with a violation of the cemetery ordinance. The only complaint filed in the case, before the mayor, was the affidavit of one *Garrison W. Allred*, that said *Bogert* did violate the ordinance in question, by entering a certain cemetery in said city, and interring therein a dead body.

A motion to dismiss for want of a sufficient cause of action, was denied.

There was judgment before the mayor against *Bogert*.

In the Common Pleas, motions to dismiss, &c., were again overruled, and the judgment of the mayor was affirmed.

Without passing upon the sufficiency of the causes of action, we proceed at once to the main questions in the suit, viz., the validity of the ordinance under which it is claimed that the suit is instituted, and can be maintained.

The city charter provides that the city council shall have power “to establish cemeteries or burial places, within or without such city, and to provide for the sanctity of the dead.”

The question in the case is, what power does this provision of the charter confer upon the city council.

The second clause of the provision, to-wit, “to provide for the sanctity of the dead,” may be laid out of the case. It has no reference to the subject-matter of this suit. It does not involve the questions, who shall bury the dead? and in which cemetery shall they be laid? The council may pass ordinances to punish the unauthorized disturbance of their repose, and the desecration of their resting

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places, no matter by whom or where, within the city limits, they were buried.

The question is, then, what power is conferred by these words, viz., "to establish cemeteries or burial places within or without such city."

It will be observed that the power conferred is alike to act under the grant within or without the city. What can be done in the premises within the city, can be done without the city.

Now, two different meanings are put upon the words above quoted from the city charter. *Bogert* contends that the words "to establish cemeteries," means to purchase, or receive by way of donation, grounds for public city cemeteries, and to devote them to that use, as the public necessity or convenience may demand.

The city council contend that the meaning is, that the council may seize upon existing private burying grounds, make them public, and exclude the proprietors from their management. In other words, that to establish means, to assume the control of that which is established.

If this be the true interpretation, then, as the city may act without or within the city, it seems to have been intended that the city council should assume the control of all the cemeteries in the county, and place them in charge of the city sexton. This, surely, the city could not do; but the city could purchase, or receive by way of donation, a tract of land without the city, and devote it to the use of the dead, and put it in the care of an agent or officer, and time will render it necessary that this be done.

Again; such a construction places the charter in conflict with the general laws of the state, while a more limited construction leaves it in harmony with them. Those laws authorize any individuals to unite themselves together for the purpose of receiving donations of lands, or purchasing the same, for cemeteries; and,

"Sec. 18. When such donations or purchases shall be made to or by any such individuals, and a certificate thereof, or conveyance therefor, together with the articles of association by which such individuals have become united

for such purpose, shall be filed in the office of the recorder of the proper county, and by him recorded, such individuals shall enjoy all the privileges necessary for the preservation and protection of such cemetery, in the same manner as if such individuals were regularly incorporated by law, and such cemetery shall forever remain a burial place for the dead.

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“Sec. 19. Lands conveyed to the board of county commissioners, by deed duly recorded, for the purpose of a public or private cemetery, shall be held by such board forever in trust for such purpose.

“Sec. 20. In all cases where the donors or donees of any public burying ground, shall lay the same off into lots, plainly designated by corner stones or posts, and record a plat thereof in the recorder's office, then persons interring in said burying place, shall bury within the lots so designated, and not out of them.

“Sec. 21. The donor of a private burying ground, his heirs and assigns forever, shall have the exclusive right of admitting corpses for interment, and shall direct where the same shall be buried, and may grant any right of burial in such ground, as shall not interfere with the graves already there, or the rights of persons who have buried their dead in such ground.

“Sec. 22. No burying ground specified in this act, shall pass or be held contrary to the intent or meaning of this section, by virtue of any subsequent devise, purchase, descent, or conveyance of the donor.” 1 R. S. p. 461. See *id.* 513.

Now, it is not uncommon for religious and charitable societies to procure cemetery grounds for their special use. We know, historically, that close beside, or more remote from the church, or the synagogue, has usually been the consecrated churchyard, in which rested the deceased members and their children. The power claimed by the city council would entitle them to invade the privacy of these sacred inclosures, and subject burials in them to the control of the city sexton; for by the ordinance enacted, no person can enter to bury, but by his permission, to be ob-

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tained only by paying him the price of digging a grave; and then the body must, by § 7, be deposited in the place designated by him, thus enabling him to scatter, in different parts of the ground, the members of the same family.

The incorrectness of the meaning claimed by the city council, for the provision of the charter in question, may be further illustrated by a reference to other provisions. For example, the charter authorizes the council to establish gas works. Would it be pretended that, therefore, the council was authorized to seize the gas works already erected by a private company?

We conclude, then, that the city charter does not empower the city council to subject to the control of the city sexton, cemeteries other than those belonging to the city.

And if it did, a grave question would arise as to the validity, itself, of so much of the charter. This is a point not necessary here to be decided, and we are not, therefore, in what we say upon it, speaking for the Court. But we lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them. Hence, a by-law might be reasonable, where population was dense, requiring those buried to be sunk to a certain depth, or to be buried outside of where population was, or was likely to become dense, and within a reasonable time after death, &c.; but we doubt if the burial of the dead can, as a general proposition, be taken out of the hands of the relatives thereof, they being able and willing to bury the same (1).

Having ascertained the law governing the case, we give its facts, as presented by the record, on which the law is to be applied.

It is agreed by the parties that the following are the facts in the case:

Union Cemetery, in the city of *Indianapolis*, was laid off into lots, about twenty years ago, by a company of private

individuals, who were, at the time, the owners of the ground. Nov. Term,
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The lots have been sold, and deeded in fee simple, to private individuals, by the original owners.

Henry Hobner was the owner of one of said lots, and, in *May*, 1859, employed *Weaver* and *Williams*, undertakers, to bury a deceased child of his therein.

Pursuant to said employment, *Weaver* and *Williams* directed *Charles Bogert* to dig the grave in said lot, for the burial of said child, and he proceeded to execute the work by virtue, alone, of such direction.

For that act, he was sued by the city, and judgment given against him, under the ordinance which has been previously noted.

The proprietors have never surrendered the *Union Cemetery* to the city.

Henry Hobner had a right to bury his own child in his own lot, being in limits where burial was allowed, without purchasing the consent of anybody.

Since the foregoing opinion was written, an additional brief has been filed by the city, raising the question of jurisdiction, but, under the circumstances, we shall not examine it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

ON PETITION for a rehearing.

Per Curiam.—This cause was submitted by agreement; was fully and ably briefed by counsel on both sides. The question of jurisdiction was not raised.

The Court did not look into it, though it might have done so had it seen proper.

The case is a clear one on the merits. Had the Court examined the question of jurisdiction, it would have changed the result only in the mode in which the cause would have gone out of Court; that is, by dismissal, instead of reversal. A rehearing will not be granted in a case like the present, for such cause. As the question upon the ordinance was one of importance—one which

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the rights of all concerned required should be finally and authoritatively settled, it was highly proper that the city attorney should, so far as he could do so, waive any point in the way of its decision.

The petition is overruled.

N. B. Taylor, for the appellant.

B. K. Elliott, for the city (2).

(1) The law of burial, in its relations to the place of interment, and the protection of the dead, is discussed with much ability and learning, in a report by the Hon. *Samuel B. Ruggles*, referee, appointed by the Supreme Court of the state of *New York*, in the matter of the widening of *Beekman street*, in the city of *New York*.

He submitted the following conclusions, as justly deducible from the fact, that no ecclesiastical element existed in the jurisprudence of the state of *New York*, or in the framework of its government:

1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind.

2. That the right to bury a corpse and to preserve its remains, is a legal right, which the Courts of law will recognize and protect.

3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

4. That the right to protect the remains, includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering their remains.

This report was brought to a hearing in the Supreme Court, in *April*, 1856, and, after argument, confirmed, in all respects, by the Court. 4 *Bradf.* 503 to 532.

(2) Mr. *Elliott*, for the city, cited the following authorities:

I. The amount in controversy being only five dollars, this Court has no jurisdiction. *The Board of Commissioners v. Chissom*, 7 *Ind. R.* 688.—*Levy v. The State*, 6 *id.* 281, and case cited.—*Bogart v. The City of New Albany*, 1 *id.* 38, and authorities cited.—*Common Council of Indianapolis v. Fairchild*, *id.* 315.—*Tripp v. Elliott*, 5 *Blackf.* 168.—*Thurman v. Hammond*, *id.* 66.—*Id.* 67.—*Reed v. Sering*, 7 *id.* 135.—*The City of Madison v. Hatcher*, 8 *id.* 341.—1 *Chit. on Plead.* 112.—*Ang. and Ames on Corp.* 7.—*Acts of 1857*, p. 56.—*Perk. Pr.* 321.

II. As this Court has no jurisdiction of the subject-matter of this suit, a judgment rendered by it is utterly void. *How. N. Y. Code*, 6.—*Doly v. Brown*, 4 *How.* 429.—*Elliott v. Piersoll*, 1 *Pet.* 328.—13 *id.* 571.—2 *How. (U. S.)* 43.—3 *id.* 750, 762, 763.—*Taylor v. Conner*, 7 *Ind. R.* 115.—*The State v. Richmond*, 6 *Foster (N. H.)*, 232.—*Stoughton v. Mott*, 13 *Verm. R.* 175.—*Brooks v. Davis*, 17 *Pick.* 148.—*Brooks v. Daniels*, 22 *id.* 498.—*Brooks v. Adams*, 11 *id.* 442.—*Kennedy v. Greer*, 13 *Ill. R.* 432.—*Smith's Leading Cases*, 821.

III. The question of jurisdiction is one that can be raised at any stage of the proceedings, and whenever a defect of jurisdiction appears, the cause must be dismissed. *The State v. The Whitewater Canal Co.*, 8 Ind. R. 321.—*Van Santv. Pl.* 725.—*Thompson v. The Steamboat Morton*, 2 Ohio St. R. 28.

IV. Courts cannot acquire jurisdiction over the subject-matter by the acts of parties. The question of jurisdiction is not waived by laches of a party. *The State v. Richmond*, 6 Foster (N. H.), 232.—*Baker v. Chisholm*, 3 Texas R. 157.—*Chapman v. Morgan*, 2 Greene (Iowa), 374.—*Thompson v. The Steamboat Morton*, 2 Ohio St. R. 28.—*Titus v. Relyea*, 8 Abbott (Pr. R.), —.

V. When a Court has no jurisdiction of the subject-matter, it will, *ex officio*, dismiss the suit. *Bryan v. Blythe*, 4 Blackf. 249.—*Gould's Pl.* 236.—3 Bouv. Inst. 248.—*Stamp v. Newton*, 3 How. (Miss. R.) 34.

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WHITEHEAD and Others v. PITCHER and Others.

Several persons became sureties for A., and to indemnify them A. executed a chattel mortgage to the sureties, jointly. The sureties paid nearly equal sums, and upon the abandonment of the property by A., a part of the sureties brought suit to sell the property to reimburse themselves, making the other sureties defendants. These defendants made default. The Court appointed a receiver to sell the property, and bring the proceeds into Court for distribution. *Held*, that in the distribution, the entire proceeds could not be applied in satisfaction of the amounts paid by the plaintiffs, but that they must be distributed *pro rata* among all the mortgagees.

APPEAL from the Jefferson Circuit Court.

Wednesday,
November 30.

PERKINS, J.—In 1853, *Abijah W. Pitcher* and eight other persons became sureties of *Robert L. Browning* in the sum of about 6,000 dollars. To indemnify those sureties, *Browning* executed to them, jointly, a mortgage on the furniture in the *Madison* hotel. The mortgage was duly recorded. The sureties paid, in nearly equal sums severally, the 6,000 dollars owed by *Browning*. *Browning* seems subsequently to have abandoned the hotel, leaving the furniture in it, and the hotel proprietors leased the same to *Culver Woodburn*. A part of the mortgagees of the furniture were proprietors of the hotel building, and did not desire to proceed, at the time this suit was commenced, to sell the furniture to reimburse themselves the

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money paid for *Browning*. The others desired to so proceed, and they commenced this suit, making their co-mortgagees defendants with *Browning*. The defendants did not appear to resist the suit, but made default. The Court appointed a receiver to take possession of the property, sell it, and bring the proceeds into Court for distribution, which was done. At the distribution, the plaintiffs claimed that they were entitled to have the entire proceeds of the sale of the property applied in satisfaction of the amounts they had paid for *Browning*, while the co-mortgagees, defendants, claimed that the proceeds should be distributed *pro rata*, to the amounts severally paid, among all the co-sureties and mortgagees. The Court gave the entire proceeds of the sale to three of the nine co-mortgagees, being the three who were plaintiffs.

There are cases where creditors may obtain priority of lien and payment by priority in institution of suit. But these are where no lien has been, or can be, acquired at law. *Hubbs v. Bancroft*, 4 Ind. R. 388.—*Butler v. Jaffray*, 12 *id.* 504. The case at bar is not such an one. Here a lien had been acquired at law by express contract. A mortgage had been taken and put upon record. There is nothing showing an abandonment, a waiver, or a forfeiture of that lien. How could the parties holding be deprived of it?

The amounts paid by the co-sureties were not paid out of a common fund, but each raised money to pay his proportion; and the amounts they thus severally paid, became separate demands against *Browning*, for which several suits could, and perhaps should, have been brought. 1 Swann's Pr., p. 41, and note 41. And each surety had a vested interest in the mortgage, to the amount of his payment. How could he be deprived of this for the benefit of a co-surety?

Whether the judgment ordering the sale of the whole property on the application of a part of the mortgagees, instead of their interest in it, was right, we need not inquire. It was acquiesced in by the other mortgagees, and they simply asked to receive, out of the proceeds of the

sale, the rateable proportion they were entitled to on the payments the record showed they had made. The Court put its refusal to allow such distribution on the ground that it would be inconsistent with the judgment which had been rendered at a previous term on default. We do not think it would have been; but if it would, perhaps that judgment, thus construed, is so palpably erroneous on its face, as to justify its reversal.

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VILLE, &c.,
RAILROAD CO.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

M. G. Bright, for the appellants.

S. C. Stevens, for the appellees.

EMERY v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

DOWNING v. THE SAME.

COCHRAN v. THE SAME.

FERGUSON v. THE SAME.

APPEAL from the *Greene* Circuit Court.

Wednesday,
November 30.

Per Curiam.—Suit upon a note payable to the order of *The Evansville, Indianapolis, and Cleveland Straight Line Railroad Company*, for 100 dollars.

Judgment by default.

The objection is that the complaint does not aver that the plaintiffs are a corporation. There is nothing in the objection. *Anderson v. The Newcastle, &c., Railroad Co.*, 12 Ind. R. 376.

The judgment is affirmed with 10 per cent. damages and costs.

J. N. Evans, for the appellant.

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CUMMINGS v. PFOUTS.

CUMMINGS

v.

PFOUTS.

In an action upon the assignment of a promissory note secured by mortgage, it is a sufficient defense to show that the note, mortgage, and judgment do not waive the appraisement law, and that property of the maker of the note has been sold upon said judgment without appraisement.

Wednesday,
November 30.

APPEAL from the *Cass* Circuit Court.

DAVISON, J.—*Cummings*, who was the plaintiff, brought this action against *Pfouts* upon the assignment of a promissory note. The note is for the payment of 500 dollars, bears date *September 22, 1849*, was executed by one *William Eidson*, and is payable to *John A. Taylor*, on or before the 11th of *August, 1854*. *Taylor* assigned the note to *Pfouts*, the defendant, who assigned it to the plaintiff.

The complaint alleges that, on the 12th of *August, 1854*, the plaintiff commenced an action on the note, and a mortgage by which it was secured, in the *Miami* Circuit Court; and at the *March* term, 1855, of that Court, recovered a judgment against *Eidson*, the maker, for 1,260 dollars, upon which, on the 20th of *April* then next following, he sued out an execution, which was delivered to the sheriff, who returned 69 dollars made on the debt, besides costs, &c. And further, it is alleged that when the note became due, *Eidson* was, and still is, insolvent, having no property subject to execution, so that an action against him would have been unavailing, &c.

Defendant's answer contains five paragraphs. The third, raises the only question, presented for our consideration. Hence, the others will not be further noticed.

By the third paragraph, defendant admits that plaintiff brought suit, in the *Miami* Circuit Court, against *William D. Eidson* and *Asinath Eidson*, his wife, upon the note and the mortgage by which it was secured, and that, at the *March* term, 1855, of said Court, he recovered a judgment against them, upon the same note and mortgage, for 1,260 dollars. But he avers that that judgment is as follows: "It is ordered and decreed, that the plaintiff recover of the defendants, *William D. Eidson* and wife, 1,260 dollars and

his costs; and that said mortgage be foreclosed, and the mortgaged premises (describing them) or so much thereof as may be necessary to satisfy the judgment and costs, be sold for that purpose, and that any balance that might remain unsatisfied after the sale of the premises, be levied of any property of the defendant. It is also averred that the mortgage was executed by *Eidson* and his wife, to secure the note sued on, and another note given by *Eidson*, of the same date, and for a similar amount, payable *August 11, 1859*; that the mortgage and notes were given in the state of *Indiana*, and payable there—both parties residing in said state—and that there was no clause in either of the notes, nor in the mortgage, waiving the appraisement laws. That the lands described, &c., and ordered to be sold, are worth 1,200 dollars, and have not been sold in accordance with said decree; but on the contrary, the plaintiff procured to be issued, an attested copy of that decree, under the seal of the Court, upon which the sheriff of *Miami* county, on the 24th of *May, 1855*, offered the mortgaged premises for sale, and the plaintiff, at that sale, bid for and purchased them for 100 dollars, and no more. And it is further averred, that the sheriff did not, previous to, or at the time of, the sale, cause the real estate thus sold to be appraised, but the same was sold to the plaintiff without regard to the appraisement laws of this state, &c.

To this paragraph the plaintiff demurred, but his demurrer was overruled, and final judgment rendered for the defendant, &c.

The demurrer admits the facts pleaded. Are they, as pleaded, a sufficient bar to the present action?

In argument, it is insisted that the sale, under the decree of the *Miami* Circuit Court, having been without appraisement, is void; that the real estate attempted to be sold, is, therefore, still the property of *Eidson*, the maker of the note, and subject to execution; and that his property not being exhausted, the suit against the assignor is premature, and consequently, not maintainable. This reasoning is consistent with the facts stated in the defense, and seems to be conclusive.

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The statute says: "When a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment." 2 R. S. p. 123.

In this case, the judgment under which *Eidson's* property was sold, contained no such order; nor did the written contract upon which it was founded, waive such relief. The result is—the sheriff's sale was a nullity. *Doe v. Craft*, 2 Ind. R. 359.—*Morss v. Doe*, *id.* 66.—*Morton v. White*, 5 *id.* 338. The paragraph in question, shows affirmatively that *Eidson*, at the commencement of the suit, was the owner of property subject to execution, and was, therefore, a sufficient defense to the action, hence the demurrer was properly overruled.

Per Curiam.—The judgment is affirmed with costs.

W. Z. Stuart and *H. P. Biddle*, for the appellant.

D. D. Pratt, for the appellee.

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This case is governed by the cases of *Price v. The Grand Rapids, &c., Railroad Co.*, and *Kiser v. The State*, *ante*, 58, 80.

Wednesday,
November 30.

APPEAL from the *Decatur* Court of Common Pleas.

HANNA, J.—*Wilson* made application for letters of guardianship for two of the minor children of *William Hillis*. The petition of *Wilson* represents, among other things, that "*John Hillis*, the executor, has perhaps, the full control of the personal estate of said wards; which will amount to not less, perhaps, than 3,000 dollars for each heir."

The executor appeared and filed an answer, averring, among other things, that "by the last will of said *William Hillis*, said executor has given to him the custody and care of said children, their education, and of their estate, and said will is herewith shown to the Court." Therefore, said *Wilson* ought not, &c.

Hillis moved that he be appointed guardian of all the children of said deceased. Nov. Term,
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Wilson demurred to the answer of *Hillis*, because it did not state facts sufficient, &c.

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The demurrer was sustained. *Wilson* was appointed guardian of said two minor heirs.

The only question here presented by the brief of appellant, is upon the ruling of the Court on the demurrer. It is insisted that *Hillis* is the testamentary guardian of the heirs mentioned, and, therefore, entitled to the control of their persons and estates.

The will is not made a part of the record, and we, therefore, do not know what were its terms and provisions, further than they are made to appear by the averments in the pleadings above stated.

No question is here made as to the record before us being complete. So far as we can see, the answer set up in defense of the application, was based upon the will therein alluded to. That will was, therefore, an instrument in writing, upon which the defense was founded, and the same, or a copy thereof, should have been filed with the answer. 2 R. S. p. 44, § 78. The answer does not, in words, if it does in terms, make the will a part thereof. The record comes here without it, and the case is thus submitted to us by agreement of the parties. We must, therefore, presume that it was not the intention of the defendant to make this will a part of that record.

The answer was not sufficient unless it, or a copy, had been filed, &c., and the demurrer was, therefore, properly sustained thereto. *Price v. The Grand Rapids, &c., Railroad Co.*, and *Kiser v. The State*, at this term (1).

Per Curiam.—The judgment is affirmed with costs.

W. Cumback, for the appellant.

B. W. Wilson, in person.

(1) *Ante*, 58, 80.

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SAUCER.

Wednesday,
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DOWNING v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

APPEAL from the *Greene* Circuit Court.

Per Curiam.—Suit by the company against the appellant on a stock subscription. Trial by the Court; finding and judgment for the plaintiff.

The only point made in the case, by the brief of counsel, is, that there should have been a continuance upon an affidavit filed. We have not examined the affidavit with a view to a determination of its sufficiency, as the motion for a new trial was not predicated upon the ruling of the Court on the motion to continue. The motion for a new trial was made upon the ground that the finding was not sustained by the evidence, and was contrary to law. In order to take advantage of the error, if one was committed, in refusing a continuance, it should have been made the basis of a motion for a new trial. *Kent v. Lawson*, 12 Ind. R. 675.

The judgment is affirmed with 2 per cent. damages and costs.

J. N. Evans, for the appellant.

D. M' Donald, *A. G. Porter*, and *J. Hughes*, for the appellees.



HERON and Another v. SAUCER.

Wednesday,
November 30.

APPEAL from the *Fayette* Circuit Court.

Per Curiam.—The first question in this case is, whether the accounts in favor of the firm of *Saucer* and *Davis* were assigned by an instrument of writing existing between them, as follows:

“ *Connersville, Indiana, September 20, 1856.*

“ Articles of agreement, made this day and date above,

witness, that *J. W. Saucer* has this day bought the entire stock in trade of the firm of *J. Saucer & Co.*, and does agree to take all the stock on hand, and, also, all of the accounts due the firm, and become liable for all of the claims which are against the said firm, and release the said *A. M. Davis* from all liabilities that the said firm is liable for at this date.

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[Signed] "*J. W. Saucer*, [seal.]
 "*A. M. Davis*, [seal.]"

We think that all such accounts as were due the firm, in their regular course of dealing were by the above instrument transferred, at least equitably, to the purchaser.

The suit was for various articles furnished in fitting up a hall for, and in feeding, &c., persons who attended a ball. A bill of particulars was filed.

Upon the trial, *Davis* testified that at the time the article of agreement was made between him and *Saucer*, no such charges as those sued upon had ever been made in their books against *Heron*, nor, so far as he was concerned, did they ever look directly to *Heron* to pay for the items now sued for.

Davis appears to have remained one of the firm of *Saucer & Co.* for some considerable length of time after the goods now sued for passed from the possession of said firm. Up to the time he left the firm, no charge appears to have been made against the defendant, of the goods thus furnished to others, nor was any written evidence shown by which he agreed to answer for the debt. A new trial should have been granted.

The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid and *N. Trusler*, for the appellants.

S. W. Parker and *J. C. McIntosh*, for the appellee.

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13	150
124	86

COON
v.
BROWN.

COON v. BROWN.

Suit upon a promissory note, dated *May 28, 1857*. Issues upon answers of payment and set-off. The note and a receipt "in full of book accounts up to date" (*May 28, 1857*), were the only evidence. The items of set-off were payments made by defendant as replevin bail for plaintiff in 1839 and 1840. *Held*, that the evidence raised a presumption of payment of the matters of set-off.

Under the R. S. of 1838, a replevin bail was required to obtain a judgment before he could have an execution; but he might have judgment on motion, when the original judgment was rendered.

Wednesday,
November 30.

APPEAL from the *Tippecanoe* Court of Common Pleas.

HANNA, J.—Suit upon a note.

Answers, payment and set-off.

Reply, denying payment, and averring that the matters set up as a set-off had, long before the execution of the note, been settled and paid.

Trial by the Court, and finding for the plaintiff the amount of the note and interest.

All the evidence given upon the trial, was the note, which was dated *May 28, 1857*, and a receipt, as follows: "*May 28, 1857. Received of James Brown, two hundred and fifteen dollars in full, of book accounts up to this date.*"

"*Peter Coon.*"

The items of set-off pleaded, consisted of certain payments made by *Coon*, as replevin bail for *Brown*, on judgments, previous to the year 1851. The form of the reply admits that *Coon* had made such payments, and relies upon the subsequent repayment thereof by *Brown* to said *Coon*. Does the proof establish such repayment? is the only question.

The appellant insists that his offsets were not included in the terms of the receipt, nor presumed to be settled upon the execution of the note, because he was a judgment-creditor, under our statute, which gives a replevin bail a right to an execution against his principal, upon the judgment, to collect any amount he may have paid thereon for his use. 2 R. S. p. 186.

At the time *Coon* became replevin bail, to-wit, in 1839

and 1840, and at the time he made the payments, as such, our statutes differed from that of 1852, in this, that the surety was required to obtain a judgment against his principal, before he could have an execution, which he might obtain upon motion in the Court where the original judgment was rendered. R. S. 1838, p. 235.—R. S. 1843, p. 956.

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v.
BAXTER.

We are of opinion that, under these circumstances, the note and receipt together, raised a presumption of the payment of the matters set up in the set-off.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

G. S. Orth and *J. A. Stein*, for the appellant.

J. M. LaRue, for the appellee.

SMITH v. BAXTER and Another.

A general answer of failure of consideration is bad.

In a suit upon a promissory note, an answer that certain articles forming a part of the consideration of the note, were injured, broken, and of no value, is bad, without an allegation of fraud or warranty.

And if the answer aver that certain articles, part of the consideration, were never received, or are lost and wanting, it must also be alleged that the failure to receive the articles, or their loss, was through the fault of the plaintiff.

A defense purporting to go to the whole complaint, but answering only a part of it, is bad.

Where a paragraph of an answer does not purport to plead a set-off, and the facts pleaded do not show a liability of the plaintiff to the defendant, it cannot be treated as a set-off.

APPEAL from the Cass Circuit Court.

Wednesday,
November 30.

WORDEN, J.—Action by the appellees against the appellant, on a note made by the appellant to one *Michael Haran*, and by him indorsed to the plaintiffs.

The defendant answered—

1. "That the consideration of the note was the purchase from the said *Haran* of certain tinware, copperware,

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stoves, castings, tin, copper, tools, finishing hammers, hardware, &c.; and avers that said property was broken, injured, and defective (to-wit, fifty stoves, one hundred pieces of casting), and had no value; and one set of finishing hammers, worth fifteen dollars, never received; which defects were fraudulently concealed by the said *Haran*."

4. "The consideration has wholly failed."

6. "As to two hundred and thirty-seven dollars of said note, he says that said note was given as alleged in the first paragraph, and that the following property so entering into the consideration of said note, was injured and broken, and of no value, to-wit:

6 stoves, at 11 dollars each.....	\$66 00
3 stoves, <i>Buck's</i> patent.....	15 00
9 stoves, at 12 dollars each.....	108 00
1 victory stove	13 00
1 set finishing tools (never received)	15 00
Pieces casting, lost and wanting.....	20 00
	<hr/>
	\$237 00

Which said goods entered into the consideration of said note at the above prices."

Demurrers were sustained to the fourth and sixth paragraphs of the answer, and exceptions taken. The other paragraphs of the answer were withdrawn, and judgment was entered for the plaintiff.

The assigned errors are, in sustaining the demurrers, and trying the cause without an issue.

The fourth paragraph of the answer was clearly bad, and the demurrer correctly sustained. "A general plea of failure of consideration is bad." *Applegate v. Crawford*, 2 Ind. R. 579.

We are of opinion that the sixth paragraph is also bad. Neither fraud nor any warranty is alleged in reference to the goods claimed to have been defective, nor is anything averred to show that the purchase was made under such circumstances as would authorize the defense attempted to be set up. It is claimed by counsel for appellant that the sixth paragraph refers sufficiently to the first to make

the allegation therein, that the "defects were fraudulently concealed by the said *Haran*," a part of the sixth paragraph. We do not so regard the paragraph. It refers to the first paragraph only for the purpose of showing for what consideration the note was given, and does not, even by reference, embrace anything more of that paragraph. So far as the nineteen stoves, mentioned in the paragraph under consideration, are concerned, the paragraph is bad for the reason above indicated. In reference to the tools "never received," and the pieces of casting "lost and wanting," it may be remarked that there is nothing in the paragraph to show that they were not received, or were lost and wanting, through any fault of *Haran*. For aught that appears, it may have been the fault of the carriers by whom the goods were transported.

But if the paragraph should be deemed good, so far as the "tools" and "pieces of casting" are concerned, still it would be defective. These tools and castings only amount to 35 dollars, and if the paragraph be deemed good as to this sum, it will still be bad because it does not answer all it purports to answer, viz., 237 dollars. A plea, to be good, must answer all that it assumes in the introductory part to answer. *Conwell v. Finnell*, 11 Ind. R. 527. Here, matter good, to say the most of it, as to only 35 dollars, is pleaded in bar of 237 dollars.

It is claimed that the paragraph is good as an answer of set-off. It does not purport to be pleaded by way of set-off; but passing by the form of it in this respect, we think it defective in substance, viewed as a set-off. The facts averred do not show any liability from *Haran* to the defendant, and the foregoing observations are applicable to the paragraph treated as a set-off.

In reference to the error assigned, that there was a trial without an issue, it may be observed that it does not appear to be well assigned in point of fact. After the withdrawal of the other paragraphs of the answer, and the decision of the Court upon the demurrers, the defendant expressing his intention to abide by the demurrers, the record proceeds as follows: "And this cause is now sub-

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mitted, by the agreement of the parties, to the Court, for decision, the intervention of a jury being waived, and the Court, after hearing the proofs of the parties, do say and find for the plaintiff the sum of 2,239 dollars, 95 cents. It is, therefore, considered," &c. It appears by a bill of exceptions, that the only evidence offered was the note declared upon. This entry may not be in the strict technical form of a judgment on demurrer, and the assessment of damages by the Court; but we regard it as substantially so. Where damages are to be assessed, in actions founded on contract, after the decision of an issue at law, the Court, a commissioner, or a jury, may make the assessment. 2 R. S. p. 121, § 367. We regard the record, under the circumstances, as showing, not a trial, but a decision of the Court, by the agreement of the parties, as to the plaintiffs' damages, for which purpose the note was submitted to the Court.

There is no error in the record, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with 3 per cent. damages and costs.

H. P. Biddle, for the appellant.

D. D. Pratt, for the appellees.

COOK and Others v. THE STATE on the relation of PATTERSON.

Under the statute of 1843, a suit might be maintained upon an official bond which had not been properly approved by the county board, if the defect was properly suggested in the pleadings.

A copy of the bond and the defective approval filed with, and made part of, the complaint, is a sufficient suggestion of such defect.

Suit upon the official bond of a county treasurer. The condition of the bond was, that the treasurer should pay over, according to law, all money that should come into his hands. The Court instructed the jury as follows: "If Cook, at the expiration of his first term, was a defaulter, and, being his own successor, used funds that came to his hands during his second term,

to pay the balance against him at the end of his first term, the sureties in the first bond are discharged, and the sureties in the second bond are liable for the money thus appropriated." *Held*, that the instruction was correct.

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COOK
v.
THE STATE.

Wednesday,
November 30.

APPEAL from the *Knox* Circuit Court.

DAVISON, J.—This was an action against *Cook*, late treasurer of *Knox* county, and his sureties, on his official bond. The bond is dated *November* 18, 1852, is in the penalty of 50,000 dollars, and is conditioned as follows:

"If the said *John M. Cook*, who has been elected treasurer, &c., will pay over, according to law, all moneys which shall come into his hands for state, county, or other purposes, and faithfully discharge the duties of his office, during the term for which he has been elected, and [during his] continuance in office, and at the expiration of such term, deliver to his successor in office all public moneys, books, accounts, &c., belonging to the office, and which may be in his possession by virtue thereof, then the obligation was to be void," &c.

This bond, having been duly signed and sealed by *Cook*, and each of his sureties, was approved in this form:

"We, the undersigned, county commissioners of *Knox* county, and state of *Indiana*, do hereby approve of the above bond and security.

"*Andrew Gordon*,
"*William Junkin*."

The complaint avers that *Cook* has not paid over, according to law, all moneys which came into his hands as treasurer, &c., for state, county, and other purposes, and that there is now in his hands, 4,000 dollars, which he received as treasurer, while acting as such under said bond, which is due, and which he has wholly failed and refused to pay over, &c. And, further, it is averred that *Cook* did not, at the expiration of his term of office for which he had been elected, deliver up to his successor in office, all public moneys, books, &c., belonging to said office, and which were in his possession by virtue thereof, although his successor duly demanded the same, &c.

Cook answered by a general denial. The other defend-

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v.
THE STATE.

ants, the sureties, in their answer, set up, 1. That the bond in suit was not received and approved by the board of commissioners, as required by the statute. 2. That *Cook* was duly elected treasurer, &c., his term of office commencing *November* 15, 1852, and ending on the 15th of *November*, 1854, or as soon thereafter as his successor in office should be elected and qualified; that the instrument sued on is his official bond, executed by them, as his securities for said term, which term expired *November* 15, 1854, and his, *Cook's*, successor having been duly elected, was, on said day, duly qualified, &c. And defendants aver that said *Cook* has fully paid over to his successor in office all the money which came to his hands, as treasurer, during his said term of office, &c.

Demurrer to the first special defense sustained; and to the second, the plaintiff replied, "that *Cook* did not pay over, &c., but on the contrary, has failed and refused so to pay, &c., and still has in his hands 4,000 dollars, as alleged in the complaint.

Verdict in favor of the plaintiff for 2,180 dollars. New trial refused, and judgment.

The first inquiry relates to the approval of the bond. The demurrer admits that it was not received and approved by the board of commissioners, as required by law. Hence, it is insisted that the sureties are not liable. We think otherwise. The statutes of 1843, under which the bond, in this case, was executed, provide that whenever any official bond shall not contain the substantial matter, &c., required by law, or there shall be any defect in the approval or filing thereof, such bond shall not be void, so as to discharge the officer and his sureties, but they shall be bound to the state or party interested; and the state, or such party, may, by action at law, suggest the defect of such bond, or of such approval or filing, and recover his proper demand or damages from such officer, and the persons who intended to become, and were included as, sureties in such bond. R. S. 1843, p. 110, § 98. See, also, 1 R. S. p. 167, § 12.

In this instance, the defect is, that the bond was not ap-

proved by the board of commissioners while in session, but simply by two persons who style themselves "commissioners of *Knox* county." Now, if this defect is properly suggested, the statutory provisions to which we have referred apply to the case at bar. The defect, it is true, is not affirmatively averred in the complaint; but the bond, and its defective approval, are set forth in the record. Both were filed with the complaint, and, therefore, constitute a part of that pleading. 2 R. S. p. 44, § 78.—12 Ind. R. 187.

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THE STATE.

Thus, the defect in the approval seems to be sufficiently shown by the complaint, and the result is, the defense to which the demurrer applies, is not available.

The record contains a bill of exceptions, which shows, that prior to *November* 15, 1852, the date of the bond, *Cook* had been treasurer of *Knox* county, and having been re-elected his own successor, was on that day duly qualified for a second term of two years, then commencing, and ending *November* 15, 1854, or as soon thereafter as his successor in office should be elected and qualified; that one *Williamson*, who was elected *Cook's* successor, was qualified on the 20th of *November*, 1854, and obtained possession of the office on the 10th of *January*, 1855, and that *Cook*, by writ of replevin, on the 18th of that month, recovered possession of the same office, and held it for some time; that on the 1st of *June*, 1852, *Cook*, then being treasurer for his first term, made his annual report to the commissioners, admitting that there was then in his hands, 3,262 dollars, 89 cents, and on the first of *June*, 1853, after the commencement of his second term, he reported thus: "There was on hand at the last settlement, 3,262 dollars, 89 cents. Receipts since that time, 21,297 dollars, 18 cents. Credit payments, 17,898 dollars, 61 cents. Balance in treasury, *June* 1, 1853, 6,661 dollars, 41 cents;" that on the first of *June*, 1854, he made a statement commencing with the balance on hand at the last settlement, and showing receipts since the first of *June*, 1853, of 15,113 dollars, 38 cents, and payments to the amount of 15,274 dollars, 13 cents, leaving a balance on hand, *June* 1, 1854, of 2,816 dollars, 64 cents; that there was also another report made

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by *Cook*, *June* 1, 1855, showing a balance against himself of 3,024 dollars, 40 cents, and a statement of his entire account, as treasurer, produced on the trial, and proved to be correct, up to the commencement of this suit, showed him to be in default, 2,180 dollars.

Thus far, the evidence shows that the balance, 3,262 dollars, 80 cents, reported *June* 1, 1852, while *Cook* was in office during his first term, was carried forward, and contributed in the production of the amount embraced in the verdict. This result, in the absence of other evidence, would have been unobjectionable; because *Cook*, having in *June*, 1852, charged himself with the then reported balance, the jury would have had a right to infer that that balance was in his hands when the bond in suit was executed, and he had entered upon his second term of office. But one *McGee*, a witness, testified, that in 1852, 1853, and 1854, he was assistant auditor; that at the *June* settlement, 1852, *Cook* had not the money for the balance in the treasury, and was a defaulter; and that during the summer and fall following, there was only a small amount of money paid into the treasury. On cross-examination, however, the witness modified his previous testimony thus: "*Cook* had not the money before the commissioners to be counted, and told witness that he had not the money, and, therefore, he, witness, stated *Cook* was a defaulter."

This evidence, it is insisted, proves *Cook* a defaulter at the time he made his report in *June*, 1852, to the amount then reported in his hands as treasurer, and if he was, the verdict cannot be sustained; because it would make the sureties sued in this action liable for a default in their principal which occurred before they became bound for a proper discharge of his duties. But the jury, in view of all the evidence, have, in effect, decided that he was not a defaulter prior to his second term, and we are not inclined to disturb that decision. Indeed, the testimony of *McGee*, relied on by the appellant, is not, in our judgment, decisive as proof, that *Cook* was a defaulter in *June*, 1852. He may not, when he made his report, have had the money before the commissioners to be counted, and still it may

have been in his hands when he entered upon his second term of service, and thus the defendants, as his sureties, liable for its appropriate payment, in accordance with the condition of the official bond.

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The Court, at the instance of the plaintiff, charged thus:

"If *Cook*, at the expiration of his first term, was a defaulter, and, being his own successor, used funds that came to his hands during his second term, to pay the balance against him at the end of his first term, the securities in the first bond are discharged, and the sureties in the second bond are liable for the money thus appropriated."

This instruction was made the subject of an exception, and the giving of it is alleged to have been erroneous. We are not of that opinion. The condition of the bond is, that the treasurer "will pay over, according to law, all moneys which shall come into his hands," &c. And it must be conceded that he could not legally use funds collected by him as treasurer, during his second term, in the discharge of a default existing at the end of his first term. The instruction seems to be pertinent to the case made by the record, and was, therefore, properly given.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

S. Judah, for the appellants.

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By the statute of 1852, removal from the state is a sufficient cause, in the discretion of the Court, for the removal of a guardian.

APPEAL from the *Posey* Court of Common Pleas.

Wednesday,
November 30.

WORDEN, J.—*Nettleton*, in 1852, was appointed guardian of *Julius Parke* and others, by the Probate Court of *Posey* county. Having removed from the state since his appointment, he was cited to appear and show cause why he

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should not be removed from the trust. He appeared and answered, admitting that he and his surety were, at that time, citizens of the state of *Ohio*, but averring that the principal part of his property was situate in said county of *Posey*, where he was engaged in business, and resides the greater portion of the year; that both he and his surety have an abundance of property, real and personal, in said county; that he is ready and willing to give any additional security that the Court may require. There are other allegations in the answer showing that the defendant had properly discharged the duties of the trust.

The Court, on the hearing, refused to receive any additional security, although it was offered, and although the matters set up in the answers were proven to be true, but removed the guardian and revoked his letters "on the sole ground that he was a non-resident of the state of *Indiana*." *Nettleton* excepted, and appeals to this Court.

The statute provides that a guardian may be removed "for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the county, or any other cause which, in the opinion of the Court, renders it for the interest of the ward that such guardian should be removed." 2 R. S. p. 325, § 11.

The above section authorizes the removal of a guardian for a "removal from the county," and is sufficient to justify the ruling of the Court below. We do not mean to say that where a guardian has removed from the county, it would be imperative on the Court below to remove him from his trust; but where the Court below does remove him for that cause, the statute expressly authorizing it, we have no authority to revise the discretion of the Court below, thus exercised. As was said by the Court, in the case of *Young v. Young*, 5 Ind. R. 513, "In cases like this, a large discretion must necessarily be left to the Court having original jurisdiction, and we will not disturb their action unless that discretion is grossly abused." No such abuse of discretion appears in the case. To be sure, the guardian had properly discharged his duties, but he had removed not only from the county, but from the state.

For this cause, it was in the discretion of the Court below to remove him, and we can by no means say that such removal was erroneous. The cases of *Pickens v. Clayton*, 7 Blackf. 321, and *Morgan v. Anderson*, 5 *id.* 503, are cited by the appellant. These cases decide that under the statute of 1838, the Probate Court could not remove a guardian except in cases relating to the faithful performance of his trust, or to the sufficiency of the security given by him. The statute of 1838 (R. S. p. 195, § 58) makes no provision for the removal of a guardian from his trust on the ground of his removal from the county; and herein the statutes are essentially dissimilar. On the whole, we do not feel authorized to disturb the action of the Court below.

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THE JUNC-
TION RAIL-
ROAD CO.
V.
CLENEAY.

Per Curiam.—The judgment is affirmed with costs.
A. P. Hovey, for the appellant.

THE JUNCTION RAILROAD COMPANY v. CLENEAY.*

A person indebted by a note not negotiable, or not assignable by the law merchant, may be made liable as a garnishee, after the note has become due and before it is assigned, but not, as a general rule, before it becomes due, nor after he has had notice of its assignment, if he rely upon such notice in his answer.

The judgment rendered against him as a garnishee, will bar a subsequent action by an assignee who had not given notice of the assignment prior to such judgment.

He may be subjected to such judgment before the note is due, where all the parties are residents of the state, and are before the Court, so that the maker may be protected from a second liability; though he cannot be compelled to pay until the note falls due.

But the maker of a note or bond negotiable by the law merchant, cannot be subjected to such judgment, without proof by the plaintiff that the negotiable paper actually remains, at the time of the trial, in the hands of the debtor against whom the attachment issued, as his property, or in the hands of a fraudulent assignee.

* A petition for a rehearing was filed on the 23d of December, 1859, and overruled on the 14th of January, 1860.

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THE JUNC-
TION RAIL-
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The bonds of a railroad company are not, it seems, exactly governed by the law merchant. But they pass by delivery, like bank notes, so as to vest a complete title in the *bona fide* possessor; and they are entitled to all the privileges of commercial paper.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—*William* and *Francis Cleneay* commenced an action, by way of attachment, in the *Marion* Circuit Court, *Indiana*, against *The Ohio Life Insurance and Trust Company*, located in *Cincinnati*.

Upon affidavit that the *Junction Railroad Company*, located in *Indiana*, was indebted to the trust company, the former was brought before the Court by process of garnishment.

The railroad company answered that they had issued bonds, payable to *Caleb Jones*, or bearer, at the office of *The Ohio Life Insurance and Trust Company*, in the city of *New York*, with semi-annual interest coupons, or warrants, attached (said bonds being substantially in the usual form of state and corporation bonds, issued for the purpose of sale to raise money), and that *The Ohio Life and Trust Company*, at one time, held a number of said bonds, but whether they had, at the time of answering, been negotiated or not, the respondent did not know, and, hence, could not admit that there was then any indebtedness on the part of the railroad company to the *Life and Trust Company*.

There is nothing in the record showing that at the time of the hearing of the cause, the *Life and Trust Company* held any of the bonds.

The Court gave judgment against the garnishee.

A person indebted by an unnegotiable note, or a note not assignable by the law merchant, may be made liable as a garnishee after such note has become due and before it is assigned. But he cannot be, before it becomes due (*Smith v. Blatchford*, 2 Ind. R. 184), nor after he has had notice of the assignment of the note, if he rely upon such notice in his answer. Drake on Attach., § 576. And the judgment rendered against him, as a garnishee, will bar a subsequent action by an assignee, who had not given no-

tice of the assignment prior to such judgment. *Covert v. Nelson*, 8 Blackf. 265. Nov. Term, 1859.

It was said above, that the maker of a note could not be subject to a judgment as garnishee, before the note fell due. This assertion should be qualified to some extent. He may be, where all the parties are residents of the state, and before the Court, so that the maker may be protected from a second liability; though he cannot be compelled to pay till the note falls due. *Brisco v. Askey*, 12 Ind. R. 666.

THE JUNC-
TION RAIL-
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But the maker of a note or bond negotiable by the law merchant, stands upon a different footing. It is doubtful if he can be subjected, at all, to a judgment as garnishee, where the holder of the paper is not before the Court, so that the rights of the maker can be protected by proper orders in the judgment. *Drake on Attach.*, §§ 582, 583, *et seq.* At all events, he cannot be subjected to such judgment without proof by the plaintiff that the negotiable paper actually remains, at the time of the trial, in the hands of the debtor against whom the attachment issued, as his property, or in those of a fraudulent assignee. *Id.*, § 582, *et seq.* The Supreme Court of *Alabama* decided, in *Winston v. Westfeldt*, that the doctrine of *lis pendens* does not apply to negotiable paper. 2 Am. Law Reg., p. 619.

In this case, the bonds of the railroad company, according to some of the cases, were not governed exactly by the law merchant. *Redf. on Railw.*, p. 595. But still they were instruments, sometimes called public securities, of a peculiar character, which passed by delivery, as do bank notes, so as to vest a complete title, at least, in the *bona fide* possessor. They were entitled to all the privileges of commercial paper. *The Morris Canal and Banking Co. v. Fisher*, 1 Stockt. Ch. 67.—S. C., 3 Am. Law Reg., p. 423. The attachment-defendants were non-residents, and, hence, not before the Court, that is, within its jurisdiction, so that they could be subjected to its orders; and it was not shown that the bonds were, at the time of the trial, in the hands of the attachment-defendants, as their property.

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Per Curiam.—The judgment against the railroad company is reversed with costs. Cause remanded, &c.

C. B. Smith and *H. C. Newcomb*, for the railroad company.

W. Henderson, for the appellees.

THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY *v.* CASTER and Another.

Where goods are delivered to a carrier, and they are not transported according to his undertaking, but are injured or destroyed, the rule of damages is the value of the goods at the place to which they were to be carried, less the freight.

Quære, whether a railroad company receiving goods directed to a point beyond the terminus of their route, is liable for such damages at the point to which the goods are directed.

Thursday,
December 1.

APPEAL from the *Elkhart* Court of Common Pleas.

PERKINS, J.—This was an action commenced by the appellees against the appellants in the *Elkhart* Court of Common Pleas, to recover the value of a threshing machine, which, it is alleged in the complaint, *Caster* and *Stutsman* delivered to the appellants at *Elkhart, Indiana*, to be forwarded to *Chicago*, and there delivered to the next connecting railroad to *Iowa City*; and which, it is alleged, was not delivered, but was broken and injured while in the custody of the appellants.

The answer of the defendants below consisted, first, of a general denial; and, secondly, of a special matter of defense, which it is, perhaps, not necessary to refer to particularly.

The cause was tried by a jury, and a verdict and judgment were rendered in favor of the plaintiffs below for 450 dollars and costs.

Instructions to the jury were asked for by the defendants, which were refused; others were given by the Court

at the instance of the plaintiffs. A motion for a new trial was made by the defendants and overruled, and evidence on the part of the plaintiffs was permitted to go to the jury against the objections of the defendants. All the questions arising in the case, were reserved by exceptions. The evidence is all incorporated into the record.

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The receipt given by the railroad company, acknowledging the delivery to them of the threshing machine, expressly limited their liability for it to the time when it should be receipted for by the connecting railroad company at *Chicago*. The loss of the machine happened between *Elkhart* county, where the appellants received it, and *Chicago*, where they were to discharge it. The Court charged the jury thus:

"The general rule, when goods are delivered to a carrier, and they are not transported according to his undertaking, as to the amount to be recovered, is the value of the property at the point of destination; and if, in this case, the machine was to be transported from *Goshen* to *Iowa City*, the obligation of the defendants is, to transport the same safely and in good order, which was not done, but on the contrary, the machine was, by the defendants, broken, injured, or destroyed, and they are liable for such value;" meaning clearly the value of the machine at *Iowa City*.

This instruction is wrong. The rule of damages, in such case, is the value of the goods at the place to which they were to be carried, less the freight. Ind. Dig., p. 389.

Again, the instruction assumes that *Iowa City* is the place of destination at which the value of the machine was to be estimated. We are not clear, that, as to the *Michigan, &c., Railroad Company*, the defendants below, *Chicago* was not the place of destination. *Parsons*, in his *Mercantile Law*, says the rule in *England* seems to be, that if a carrier takes goods marked for a place beyond his own route, he will be liable for the goods to the place to which they are marked for delivery; while in the *United States*, he says, the weight of authority is, that he will not be liable beyond his own route without an agreement to that effect. *Parsons, supra*, pp. 215, 216. See *Denmeson*

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v. *The Camden, &c., Railroad Co.*, 4 Am. Law Reg. 234, and note.

But will this principle have any application in determining the rule for the assessment of damages for a loss happening upon either of the routes making up the whole line of transportation? This question will be left undecided till it has been argued.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles, for the appellants (1).

R. Lowry and *J. A. Liston*, for the appellees.

(1) Extract from Mr. *Niles'* brief:

The company only undertook to deliver the machine to a connecting line at *Chicago*, and their liability beyond that point was expressly limited by the written contract—the bill of lading. Even without such an express limitation, that, in this case, would have been the extent of their liability. *Ackley v. Kellogg*, 8 Cow. 223.—*Pierce on Am. Railr. Law*, 451.

It would be unreasonable to hold the company liable for the value of the goods at *Iowa City*. If the evidence on which to base the damages in this case was properly admitted, or if the instruction be correct, then, in case the *Boston and Lowell Railroad Company* should receive goods in *Boston*, marked for *St. Paul*, in *Minnesota*, agreeing to carry them to *Lowell*, and there deliver them to a connecting line, they would be liable, in case the goods were lost, to pay their full value at *St. Paul*. In case of cheap and bulky goods, the value might be double what it would be in *Boston* or *Lowell*, and the owner could recover that double value without having paid any freight or incurred any expenses.

It is the better settled *American* doctrine, that a carrier receiving goods marked to a particular destination, is bound only to transport to the end of his route, when he becomes a mere forwarder. *St. John v. Van Santvoord*, 25 Wend. 666.—*Van Santvoord v. St. John*, 6 Hill, 158.—*Elmore v. Naugatuck*, 23 Conn. R. 457.—*Edw. on Bail.*, 504.—1 Pars. on Cont., p. 687, note *k*.

But in this case, the undertaking being so limited by express contract, it is clear that no responsibility attaches to the company beyond *Chicago*. It follows, as a corollary, that the evidence as to the value of the property at *Iowa City*, which was the only basis for the verdict, was improperly admitted, and the instruction on that point was erroneous.

It follows, also, that there was no sufficient evidence to sustain the verdict, for there was nothing from which the jury could ascertain the true measure of damages.

But, again, there was no refusal to deliver these goods, and there was no evidence of a conversion of them by the company. They were seen at *Laporte* in an injured condition, and they may have been detained on the road for an unreasonable time, though there is no evidence on that subject. The mere failure to deliver the property at *Chicago* in a reasonable time, does not make

the company liable for its entire value. *Robinson v. Austin*, 2 Gray, 564.— Nov. Term, 1858.
Bonlin v. Nye, 10 Cush. 416.—*Scovill v. Griffith*, 2 Kern. 509.

When goods are only damaged, the owner is still bound to receive them, and cannot go against the carrier for a total loss. Redf. on Railw., p. 320.

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The domicil of the parents at their death, is the domicil of their infant heir, and he cannot change that domicil of his own volition.

The distribution of personal property descending to such infant, wherever situated, must be governed by the law of that domicil, and the property should be remitted there for that purpose; and the Court there is under no obligation to remit funds to another state for the education and maintenance of the infant.

Hence, that domicil is the proper place for the residence and education of the infant, and a Court of another state may direct him to be delivered up to be taken to that place by the proper guardian; and although the power of a guardian is local to the state in which he receives his appointment, yet he is competent to receive the property or the custody of the ward when placed in his hands by such Court, to be taken to the state where both belong.

But such guardian, to entitle him to receive the property or the custody of the ward, must make proof of his guardianship.

The Court must use a sound discretion in making orders in such cases.

APPEAL from the *Lawrence* Circuit Court.

Thursday,
December 1.

PERKINS, J.—On the 13th day of *September*, 1858, *Wesley Hofer*, by his attorney, filed in the clerk's office of the *Lawrence* Circuit Court, a complaint reading as follows:

"*Wesley Hofer* complains and shows to the Court that he is the legally appointed guardian of the person and estate of *William Thomas Walker*, a minor; that the said *William Thomas* is the son and only heir at law of *John K. Walker* and *Dorcas Walker*, both of whom are now dead; that said *John K.* and *Dorcas* died in *La Rue* county, *Kentucky*, the place of their residence, and that afterwards, by the proper Court of said county, letters of guardianship over the person and estate of said infant, were issued to plaintiff.

"The plaintiff further shows that soon after the death

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of the mother, who survived the father of said *William Thomas*, one *Zachariah L. Warren*, without the consent of the friends of *William Thomas*, caused him to be removed to the county of *Lawrence*, state of *Indiana*, where he now detains him under pretext of a guardianship conferred by a Court in *Indiana*, and refuses to permit him to return to *Kentucky* with the plaintiff.

“Plaintiff further shows that he is the uncle as well as the legal guardian of said *William Thomas*.

“Plaintiff further shows that there is no estate belonging to said *William Thomas* in *Indiana*, while there is a respectable estate, which he inherits from his parents, in *La-Rue* county, *Kentucky*; and that there, also, dwell the larger portion of his friends. In consideration of the premises, plaintiff prays that said *Warren* may be required to produce the body of said *William Thomas* before this Court, and that the Court will direct that he be delivered to this plaintiff, to be taken to his home in *Kentucky*.

[Signed] “*Wesley Hofer.*”

The complaint is sworn to.

No copy of letters of guardianship appears to have been filed.

A writ of *habeas corpus* was issued, and the infant brought, in obedience to it, before the Court, with the following return thereto by *Warren*, showing the cause of the infant's detention:

“*Zachariah L. Warren*, the defendant hereto, for return to the writ of *habeas corpus*, says, that he has the said *William T. Walker* under his control, and residing in his family, and that he now here produces him in Court. He admits that said *William* is the son of *John K.* and *Dorcas Walker*, deceased, who both resided in the state of *Kentucky*, where they died, and that neither of them ever resided in *Indiana*. But he states that said *William Thomas* is the nephew of his, said *Warren's* wife, and that it was the wish of the mother of *William Thomas*, that his said aunt should take him and take care of him after her death; that it was in fulfillment of that wish, that the grandmother of said *William Thomas* brought him to the house of

said *Warren*, in *Indiana*, and that he, said *Warren*, has since kept him as a member of his family till he is now about twelve years old; and he avers that said *William Thomas* still desires to remain with defendant.

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"The defendant further states that he has taken out, from the proper Court in *Indiana*, letters of guardianship over the person of said infant, and he denies that the plaintiff has taken out letters, as he alleges, in *Kentucky*. A copy of the letters of the defendant is filed with the return.

Signed and sworn to by *Zachariah L. Warren*."

Exceptions were filed to this return, for insufficiency; they were sustained, and the infant was ordered into the custody of the plaintiff, *Hofer*. Was this ruling correct?

The domicil of the parents of *William Thomas Walker*, at their death, was in *LaRue* county, *Kentucky*. Such being the case, that place was also the domicil of their infant son and heir. The infant could not, of his own volition, change that domicil, and we think it is not shown to have been changed. *Hiestand v. Kuns*, 8 Blackf. 345.

The distribution of the personal property, therefore, descended from the parents to the infant, no matter where situated, must be governed by the law of *Kentucky*, and the property should be remitted there for that purpose. *McClerry v. Matson*, 2 Ind. R. 79. The funds belonging to the infant being in *Kentucky*, the place of domicil, the Courts of that state would be under no obligation to remit any portion of them to this, for the education or necessary maintenance of the infant. For these and other reasons, it would seem, other things being equal, that the place of domicil was the proper one for the residence and education of the child. And there is no doubt about the power of the Court to direct the infant to be delivered up to be taken to that place by the proper guardian. Though the power of a guardian, like an administrator, is local to the state in which he receives his appointment, yet, he is competent to receive the property, or the custody of the ward, when placed in his hands by the Courts of another state, to be taken to the state where either or both belong, and in which he received his appointment. *McClerry v.*

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Matson, supra.—*Hope v. Hope*, 27 Eng. Law and Eq. 249.
—*Dawson v. Jay, id.* 451.—*Powers v. Morte*, 4 Am. Law
Reg. 427.—*In re Dawson, id.* 241.

But in this case there does not appear to have been any proof that the plaintiff was the guardian of the infant, *William Thomas*. Without such proof, we think the Court should not have awarded him the custody of the infant. A wise care and discretion should be exercised in the making of an order that might be of such vast consequence in its bearing upon the future welfare of the subject of it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Boker, for the appellant (1).

J. Collins, for the appellee (2).

(1) No brief for the appellant reached the Reporter.

(2) Extract from the argument of Mr. *Collins*.

The principal, and perhaps only, point in this cause, is presented by the conflict of jurisdiction as to the appointment of guardian.

For the appellee we take the position—

1. That the domicil of the parent at the time of his death, continues the domicil of the child until it acquires its full age; and

2. That the domicil of the minor is the jurisdiction for the guardianship of his person and estates.

Upon the first point, see 1 Binney, 349 to 355—"The domicil of origin arises from birth and connection. A minor during pupillage cannot acquire a domicil of his own. His domicil, therefore, follows that of his father, and remains until he acquires another, which he cannot do until he becomes a person *sui juris*. Am. Lead. Cases, 725.—*Powers v. Morte*, United States Circuit Court for the Eastern District of Louisiana, reported in the Am. Law Reg., May, 1856, vol. 4, No. 7.—8 Blackf. 345.

In the *Louisiana* case, Judge McCALB, holds the following language: "It is clear, in point of fact, that the domicil of the father was in Louisiana; and it is equally clear, in point of law, that the appointment of tutor or curator to a minor belongs to the judge of probates of the place of domicil or usual residence of the father and mother of such minor, if they, or either of them, be living. If the father and mother be dead, the appointment shall be made by the judge of probates at their last place of domicil, or, if they had no domicil, of the minor's nearest relations. The place of the birth of a person is considered as his domicil, if it is, at the time of his birth, the domicil of the parents. The domicil of birth of minors continues until they have obtained a new domicil." * * "We have seen that there has been no change of domicil since the death of the father, for the reason that it is not in the power of the children, during their minority, to make such change."

These questions are reviewed with learning and ability, by Mr. Surrogate *Bradford of New York*. See *Am. Law Reg.*, vol. 4, No. 4, *February*, 1856, *ex parte Dawson*. "In the case of a minor born in the city of *New York*, of a father there resident, a naturalized citizen, and a mother there resident, a native citizen, the residence of the parents there continuing until their decease, the place of birth and the domicil of the parents made *New York* the place of the domicil of the child." "The domicil of origin can be changed only by choice, and a domicil of choice cannot be acquired by the act of the minor, or of any other person except the parent or the guardian." Reported in 3 *Bradford's Surrogate R.*

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It has been suggested that the statute of the state of *Indiana* securing a residence to minors, where parents shall have no residence within this state, and who, themselves, shall have resided one whole year, without interruption, in any county in this state, and who shall have thereby gained a settlement in such county, secures to this child a residence within the state, independent of the rights of the jurisdiction of the domicil of origin. 1 R. S. pp. 401, 402, § 5.

It is submitted that this enactment has no bearing whatever on the questions here discussed. In the first place, this child is not in the category contemplated by § 5, as "being poor, and standing in need of relief," for he has a fortune in *Kentucky*, where it is the desire of his uncle to take him and have him educated with his kindred.

The principle here contended for is fully recognized by the second paragraph of § 5 of said act—"Legitimate children shall follow and have the settlement of their father."

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The provision of the revised statutes, that process cannot run less than three nor more than thirty days (2 R. S. p. 454), the provision of the act of 1853, that in suits before a justice of the peace, against a railroad company, for stock killed, a day should be fixed for trial without specifying within what time, and that at least ten days' notice thereof should be given by summons (Acts of 1853, p. 113), and the provision of the act of the same year, that where the principal office of the company is out of the state, at least thirty days' notice shall be given of the time and place of the pendency of suit (Acts of 1853, p. 102), should be construed together; and in every summons the day of trial should be set not exceeding thirty days after the date of the summons.

In cases before a justice of the peace, where service is too late for the day of trial named, it is the duty of the justice, under the code, if want of sufficient service be not waived, to continue the cause to a future day, not unreasonably distant.

Upon such service, therefore, though a judgment by default cannot be ren-

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dered till the statutory time of notice has expired, still the service operates to inform the party of the pendency of the suit, and he is bound to take notice of the subsequent action of the Court therein.

Where service upon a railroad company having their principal office out of the state, in an action before a justice for killing stock, had been made ten days, and nothing appeared showing the justice that the case was not ready for judgment, and judgment was rendered upon such insufficient notice, it was *held*, that the defendants might have the judgment opened, on application, in ten days, or they might have it vacated in a direct proceeding at any time after ten days and before payment, or they might appeal. But it was *held*, also, that the case could not be dismissed on appeal; because the insufficient service was not ground of dismissal, but only of a continuance, before the justice; nor would the fact be ground of continuance on appeal, for a continuance in that Court would be granted or not, as cause might be shown then and there to exist.

Thursday,
December 1.

APPEAL from the *Laporte* Circuit Court.

PERKINS, J.—Suit, commenced before a justice of the peace, against *The Michigan Southern and Northern Indiana Railroad Company*, to recover for stock killed. The summons was served upon the conductor of a passenger train, and required an appearance for trial upon the twelfth day thereafter. On that day, judgment was taken by default against the company. The company did not appear or appeal within thirty days thereafter; but later than that, obtained an order from the Circuit Court upon the justice to allow an appeal, which he did, and it was taken. In the Circuit Court, the company, by attorney, made an affidavit that their principal office was out of the state of *Indiana*, and upon the affidavit, moved that the cause be dismissed for the want of sufficient service of process. The motion was overruled, and, on a trial, the judgment of the justice was affirmed. New trial denied.

By the revised code, a summons cannot run less than three, nor more than thirty days from and after the day of date. Within those limits, a day for trial must be named in it, and it must be served, at least, three days before that named for the trial. 2 R. S. p. 454.

On the first of *March*, 1853, an act was passed providing that in suits before a justice of the peace for stock killed, a day should be fixed for trial, without specifying within what time, and that, at least ten days' notice there-

of should be given by service of summons. Acts of 1853, p. 113. On the fourth of the same month, another act was passed, providing that where the principal office of the company is out of the state, "at least thirty days' notice shall be given of the time and place of the pendency of said suit." Acts of 1853, p. 102.

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We think these three statutes should be construed together, and that in every summons, the day of trial should be set, not exceeding thirty days after the day of the date of the summons. Unless this construction be adopted, there will, in railroad cases, be no expressed limit within which a day of trial must be set, and great abuse might be the consequence. But the service of the summons must be, under the code, three days, under the general railroad act, ten days, and under the act governing those particular cases where the principal railroad office is out of the state, thirty days, before the day of trial. Suppose, however, that the service is not so made, but that it is made less than the required number of days before that named as the day of trial; what then? Prior to the code of 1852, it would seem that the suit necessarily abated or was discontinued, unless the defendant appeared and waived the insufficiency, in point of time, of service. The justice could not render a judgment by default where such want of sufficient service appeared, or if he did it would be void. This was so decided in *Wort v. Finley*, though, from the abridgement of the case, reported in 8 Blackf. 335, the point does not appear. The defendant would not be bound to answer upon such service as above; and no power was given by former codes to the justice, to continue the cause to a future day, in his discretion, for trial. R. S. 1843, p. 866. If the defendant did appear, therefore, instead of waiving the want of full notice, and consenting to a trial or a continuance, he might defeat the suit by a motion to quash the writ.

If in any case, the want of jurisdiction by proper services did not appear to the justice, but actually existed, and he rendered judgment by default, such judgment could be

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avoided at any time before its satisfaction, by a direct proceeding for that purpose. *Brickley v. Heilbruner*, 7 Ind. R. 488.

By the code of 1852, in cases where service is too late for the named day of trial, the practice before justices of the peace is changed. It is made the duty of the justice, where the want of sufficient service is not waived by consent, to continue the cause to a future, but not unreasonably distant day. 2 R. S. p. 454, § 22. Upon such service, therefore, under the present code, though a judgment by default cannot be rendered against a party till the statutory time of notice has expired, still, it operates to inform him of the pendency of the suit, and he is bound to take notice of the subsequent action of the Court therein. And, in this case, service had been made ten days, the time required by the general statute. Nothing appeared showing the justice that the case was not ready for judgment. The fact which rendered it not so, was extrinsic—one not necessarily within the knowledge of either the plaintiff or the justice, but was within that of the defendants; and it should have been made known by the defendants, at the proper time, to the justice. It was not so made known, and judgment was rendered upon insufficient notice. Several courses were then open to the defendants. The judgment might have been opened upon application, in ten days. It might have been vacated by a direct proceeding instituted for that purpose, at any time after the lapse of such ten days, and before payment. *Brickley v. Heilbruner, supra*. Or an appeal might be had. The latter was the remedy resorted to. But by this remedy, the case could not be dismissed on appeal; for the reason that the insufficient service was not ground of dismissal, but only of a continuance, before the justice. Nor would the fact be ground of continuance, on appeal. A continuance, in that Court, would be granted, or not, as cause might be shown then and there to exist, or otherwise.

The Court did right in overruling the motion to dismiss, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs. Nov. Term,
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J. B. Niles, for the appellants.

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Where nothing was claimed upon a paragraph of a complaint, and no evidence was offered in support of it, a trial without an issue upon it will not authorize a reversal of the judgment.

A notice, given in *Centreville, Indiana, December 23, 1856*, to take depositions in *Rochester, Monroe county, New York*, on *Thursday*, the first day of *January* ensuing—the term of the Court in which the cause was to be tried, commencing on the first *Monday* of the latter month—was held to be sufficient. The Courts, in such cases, will take notice of the facilities of travel, in determining the time necessary to pass from point to point.

APPEAL from the *Wayne* Court of Common Pleas.

Thursday,
December 1.

HANNA, J.—Suit upon a written agreement.

Answer, first, a general denial; second, fraud, setting out specially the fraudulent acts, &c.; third, fraud generally.

Demurrer to the second and third paragraphs of the answer, overruled as to the second, sustained as to the third. Leave given to amend the third, and also to “plaintiff to file an amended complaint.”

Reply in denial of second paragraph of the answer.

Second paragraph filed to the complaint.

The record does not show any amendment to the third paragraph of the answer, nor any answer to the second paragraph of the complaint, unless the general denial of the matters averred in the complaint, operated as an answer to the second paragraph of that complaint, although that paragraph was not filed until after the answer.

This raises the first question, for it is insisted that, as to the second paragraph, there was a trial without an issue.

There was a verdict and judgment for the plaintiff for 170 dollars.

The first paragraph of the complaint was upon a writ-

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ten agreement by which the defendant promised to pay the plaintiff 170 dollars, for a certain number of strawberry roots, to be delivered at a certain time and place, &c. The second paragraph, was for money lent, money paid to the use of the defendant, and for labor and materials furnished.

The question upon which much of the argument of counsel, on both sides, was bestowed, namely, whether the general denial could apply to the second paragraph of the answer, does not appear to us to be involved in this case, under the circumstances, and we do not, therefore, decide it (see 2 Ind. R. 36; 5 Blackf. 445); because a bill of exceptions taken to the rulings of the Court, in giving and in refusing instructions, contains this language, to-wit, "there being nothing claimed on, or evidence offered in support of, the second clause in the complaint." By the word "clause," we understand the paragraph to be meant. And as, on the trial, there was nothing claimed upon, or evidence offered in support of, the matters alleged in that paragraph, we do not see how the defendant, by his failure to make an issue specially upon it, could have suffered such an injury as would authorize a reversal of the judgment, even if a reversal would, in any instance, be proper upon the suggestion of the negligent party—a point we do not decide. See 11 Ind. R. 288.

The next point made, is, that the Court erred in overruling a motion by the defendant to suppress depositions. The objection was as to the sufficiency of the notice. The notice was given in *Centreville, Indiana*, on the 23d day of *December, 1856*, to take depositions in *Rochester, Monroe county, New York*, on *Thursday*, the first day of *January, 1857*. On the next *Monday*, to-wit, the first *Monday* of *January*, the Court, in which the case was to be tried, was to convene for the term. We are not informed upon what day of the term the case was fixed for trial; nor is there any evidence of the distance from *Centreville* to *Rochester*, or the ordinary, usual mode of travel from the one place to the other.

It is insisted, first, that, under the decision in *Cefret v.*

Burch, 1 Blackf. 400, the notice was not a sufficient length of time before the day fixed for taking the depositions; and, second, that the day on which the depositions were to be taken was, considering the distance, too near the commencement of the term of the Court.

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In the case cited, seven days was considered too short a notice, in 1825, given in *Daviess* county, *Indiana*, to take depositions in *Hamilton* county, *Ohio*. Considering the relative distances between the geographical points in that case, and in this, the decision in this, must be the same as in that, unless some facts exist, operating in this case, which did not in that. It is assumed, as a matter of course, in the argument, that the Court will take notice of the artificial improvements in the country, whereby a person can pass from place to place with increased facility over the mode resorted to in 1825. Upon this point, the sufficiency of the notice depends. Our statute is, that "The adverse party shall be allowed a reasonable time to travel from his usual place of abode to the place of taking the deposition, by the ordinary route of travel, exclusive of the day of service, the day of taking the deposition, and intervening *Sundays*." 2 R. S. p. 85.

The Supreme Court of the *United States* makes use of this language, namely, "that the Court is bound to take notice of public facts and geographical position." *The Apollyon*, 9 Wheat. 362. Which proposition is afterwards adverted to approvingly. *Peyroux v. Howard*, 7 Pet. 324. See, also, *The United States v. La Vengeance*, 3 Dall. 297. But in the case in 7 Pet., *supra*, it is also said, that "It cannot certainly be laid down as a universal, or even as a general proposition, that the Court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the Court may judicially notice."

We are of opinion that the fact that the usual route and speed of travel, from *Centreville, Indiana*, to *Rochester, New York*, is by railroad, is a public fact of which this

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Court can as well take notice as it could of the route and mode of passing from point to point, as decided in the case in 1 Blackf. *supra*.

Applying that principle to the case at bar, it will be seen that there would be some eight days to make the necessary preparation and go from the one point to the other; and that the actual time necessarily consumed in making the journey need not exceed twenty-four to thirty-six hours. Therefore, the notice was a sufficient length of time before the day of taking the depositions.

As to the second point, it is argued that more than one day might be required to take the depositions, and, therefore, sufficient time might not remain to return before the day of the trial. The answer to this is, that by our statute (2 R. S. p. 88, § 263), the deposition must be filed in Court at least one day before the day the cause stands on the docket for trial, or if filed afterwards, the opposite party, upon good cause shown, would be entitled to a continuance. We are not aware of any mode by which the deposition might be legally returned at an earlier day than the party could himself return.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. B. and G. W. Julian, for the appellant.

O. P. Morton and J. F. Kibbey, for the appellee.

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Where the pleadings show that money passed into the hands of the defendant as stakeholder of a wager upon the result of an election, an action may be maintained against him by the party who disaffirms the illegal contract, and notifies him thereof before the money is paid to the other contracting party. Section 2, 1 R. S. p. 305, has reference to the rights and remedies of parties to certain illegal contracts, as between themselves, and not to the right of action, nor the time within which it must be brought, against a stakeholder. Where the defendant withdrew the general denial, and was thereupon permitted to open the case, and all the evidence offered by him being rejected, the

plaintiff was permitted to present his evidence, it was contended that this was error, as there was nothing to rebut. But another paragraph of the answer traversed every part of the complaint not confessed and avoided. There were material allegations neither confessed nor avoided. *Held*, that the defendant was not entitled to open the case, he not having the affirmative of the issue.

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The defendant offered to withdraw a paragraph of his answer, upon the condition that the evidence applicable to it should be stricken out. This was refused. *Held*, that the refusal was within the discretion of the Court.

A defendant cannot introduce, as evidence, a paper filed in a previous action by the plaintiff against another defendant, though brought, in part, for the identical money or thing in suit in the present action.

APPEAL from the *Randolph* Court of Common Pleas. *Thursday, December 1.*

HANNA, J.—Suit by *Hunt* against stakeholders, for money deposited with them upon the result of the presidential election.

There are two paragraphs in the complaint. *First*. For money had and received, &c. *Second*. Setting out the facts of the wager between the plaintiff and one *Snodgrass*; the deposit of the money with the defendants; the notice not to pay over; and the demand, &c.

An answer of seven paragraphs was filed.

A demurrer was sustained to the second, third, and fifth paragraphs, and a part of the seventh was stricken out. These rulings of the Court are assigned for error; but no injury could thereby have resulted to the appellants, as the same evidence could have been given under the fourth paragraph, which would have been admissible under the averments in the others.

It is insisted, first, that, as a wager upon the result of an election is an illegal contract, no action can be maintained for money paid to, or deposited with, a stakeholder, in such transaction; and secondly, that if such an action can be brought, that it must be commenced within six months from the time the money is placed in the hands of the stakeholder, under § 2, 1 R. S. p. 305.

Where the pleadings show, as in the case at bar, that the money passed into the hands of the defendant as a stakeholder merely, an action may be maintained against him by the party, who disaffirms the illegal contract, and notifies him thereof before the money is paid to the other

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contracting party. *Alexander v. Mount*, 10 Ind. R. 161.—
Morris v. Philpot, 11 id. 447.—*Frybarger v. Simpson*, id. 59.

The second section of the statute above referred to, has reference to the rights and remedies of the parties to certain illegal contracts, as between themselves, and not to the right of action, or the time within which it must be brought against a stakeholder. *Wade v. Deming*, 9 Ind. R. 35.

The defendants withdrew the first paragraph of their answer, which was the general denial, and was thereupon permitted to open the case, under the supposition that the affirmative of the issues was upon them. All the evidence offered by the defendants was rejected. The plaintiff was then permitted to present his evidence. This is said to be erroneous, as the case stood upon the pleadings, after the rejection of the evidence of the defendants, for the reason that there was nothing to rebut.

Whatever the rule might be, if the defendants had really been entitled to the affirmative, we need not decide, as they were not so entitled upon the fourth paragraph of the answer. That paragraph professes to traverse and deny every part of said complaint not herein confessed and avoided.

The allegation in the complaint, of notice, &c., is not confessed, nor is it, in our opinion, avoided. The averment upon that point is, that after the election the winner applied for the money to one of the defendants, who applied to plaintiff to know if he should pay it over. "And the said plaintiff then and there told said *Burroughs* that there might be a mistake about the result, and to hold on until it was known;" that he held on until the fact was known, and then paid, &c. Under the decision in the case of *Frybarger v. Simpson*, *supra*, this statement would have operated as an affirmance of the contract, and, therefore, not as a notice to not pay at all. As other parts of the paragraph denied that notice, it devolved upon the plaintiff to prove it.

After the evidence for defendants had been rejected, and that for plaintiff heard, the defendants asked leave to withdraw the fourth paragraph of the answer, on condition that

the Court would strike out the evidence applicable to that issue. This was refused. In this we do not perceive any error. If the Court could, under such circumstances, sustain a conditional motion of the character indicated, it would be the exercise of a discretionary power, the abuse of which would alone be error.

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The only question remaining is, as to whether the evidence offered by the defendants was properly rejected. That evidence, the record informs us, consisted of "a paper duly filed by the parties, in this Court, on the — day of *January*, 1857, in an action then pending in this Court, wherein the plaintiff in this action was the plaintiff, and *Samuel Burroughs*, one of the defendants in this action, and *William Snodgrass* and *Joseph Sisk* were defendants, and that said action was brought in part for the same identical money sued for in this action." That said action was dismissed, and said paper had remained on file, &c.

The ruling of the Court was correct. It is enough to say that the paper offered in evidence had not been prepared and placed on file in a case between the same parties to the suit then being tried. Whether it should have been received as evidence, in a subsequent case between the same parties, &c., is a point not before us, and upon which we intimate no opinion.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. Smith and *J. Brown*, for the appellants.

W. A. Peelle, for the appellee.

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Where a contract for the delivery of ten thousand bushels of corn specified that two thousand six hundred bushels of the corn was already in pens, and was put at the purchaser's risk as to damage by rain—*held*, that it cannot be implied that the purchaser accepted the corn in pens as being two thousand six hundred bushels.

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Held, also, that the vendor must bear all shrinkage, or loss, or damage of the corn in pens, except damage by rain, until the corn was received by the purchaser.

Where an executory contract stipulates for the delivery of a certain quality of produce, without passing title to any particular produce, the vendor is not a bailee of the produce prior to the delivery at the place and within the time fixed. The contract is discharged by the delivery of the article, of the quality mentioned.

If, in the absence of fraud or warranty, a purchaser accepts and receives goods, he thereby not only waives defects, but he is so far concluded that he cannot recover for any patent and known defect.

Where the contract is for the delivery of goods of a certain quality, but the particular article to be delivered is not fixed, there is no warranty that the goods when delivered shall be of the quality mentioned; and the failure to deliver goods of such quality is not a breach of warranty, but a breach of the contract.

Thursday,
December 1.

APPEAL from the *Tippecanoe* Court of Common Pleas.

WORDEN, J.—Suit by the appellants against the appellee on a contract, as follows:

“*Edinburgh, December 21, 1854.*

“I have this day sold *Ricketts* and *Daily* ten thousand bushels of good merchantable corn, to be delivered them on the cars at *New Bradford*, about thirty miles north of *Lafayette*, they to furnish cars to transport the same, and should they not furnish cars enough to carry all of it, by the 15th day of *February* ensuing, they are to receive the balance of it in pens, on the railroad. Twenty-six hundred bushels of the corn is now in pens, and is to be left until the last, and is at their risk as to damage by rain; they to pay me for the same at the rate of 45 cents per bushel, as follows: An order on *James Mix*, Esq., for five hundred dollars, and pay my acceptance for three thousand dollars, due about the 15th of *February* ensuing, and payable in the city of *New York*, and the balance when the corn is delivered. If the twenty-six hundred bushels above mentioned, should be taken off by the 15th of *February*, I am still bound to attend to the shipping of it. In testimony,”
&c.

[Signed] “*Cormacan Hays.*”

There was a supplemental contract between the parties, but as no question arises upon it, and as the above con-

tract is not varied by it in any matter upon which any question arises, it need not be here stated.

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It is averred in the complaint that the plaintiffs have paid the purchase-money for the corn, but that, although the plaintiffs furnished cars, &c., only nine thousand four hundred and thirty-nine bushels of the corn has been delivered, and that four thousand seven hundred and fourteen bushels of that so delivered was not good merchantable corn, but was greatly damaged and of inferior value, and worth ten cents less per bushel, than if it had been good merchantable corn.

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Answer, that the defendant delivered to the plaintiffs, as agreed, seven thousand four hundred bushels of corn, under said agreement, and, also, the two thousand six hundred bushels mentioned in the contract as being in pens, all of which corn was received by the plaintiffs, on said cars, under said contract.

The replication denies the delivery of all the corn, and denies that what was delivered, was received by the plaintiffs as good merchantable corn, under the contract.

There were other matters pleaded, but the above statement of the pleadings is sufficient to an understanding of the questions presented.

Trial by jury; verdict and judgment for the defendant, over a motion by plaintiffs for a new trial.

On the trial it appeared that all the corn contracted for had been delivered, provided the two thousand six hundred bushels described in the contract as being in pens, held out.

In relation to this lot, it was proven by a witness named *Watson*, that when the corn was put into the pens, in *November* and *December*, 1854, there were two thousand six hundred and eleven bushels. It was also proven by another witness, *Averett*, who superintended the getting of the cars for the plaintiffs, and weighing the corn, and was present when it was weighed and placed upon the cars, in *June*, 1855, that there were then but two thousand three hundred and ten bushels.

The Court charged the jury, in relation to this point, as follows:

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"The corn mentioned in the contract as being in pens, was agreed upon at two thousand six hundred bushels, and if you are satisfied that there was that amount placed in the pens, and was there when the contract was made, and there is no evidence tending to show that any portion of it was removed, wasted, or injured, except by rain, and if you believe that all the corn put in pens was shipped to the plaintiffs, then you will not consider the testimony of *Averett*, that there was only two thousand three hundred and ten bushels in the pens, in *May* and *June*, 1855, and that testimony is withdrawn from you, and, in such case, you should find according to the quantity sworn to by *Watson*, namely, that there were two thousand six hundred bushels in the pens."

To this charge the plaintiffs excepted.

The plaintiffs asked the following charge, viz.:

"If there was a deficiency in the quantity of corn delivered by the defendant under this contract, the plaintiffs are entitled to recover the value of as much corn as was deficient, whether the deficiency arose from the fact that there was not two thousand six hundred bushels delivered on the cars from the pens mentioned in the contract, or otherwise."

This charge was refused, but modified and given as follows:

"If there was a deficiency in the quantity of corn delivered by the defendant under this contract, the plaintiffs are entitled to recover the value of as much corn as was deficient."

Exception was taken.

We suppose that when the Court instructed the jury that "the corn mentioned in the contract as being in pens, was agreed upon at two thousand six hundred bushels," it had reference to the terms of the written contract in question, as there was no other evidence of such agreement, and had there been, it would have been for the jury to determine whether such agreement existed. The terms of the contract do not, in our opinion, sustain the proposition thus laid down by the Court to the jury. The contract is

for the delivery of ten thousand bushels of corn, and specifies that "two thousand six hundred bushels of the corn is now in pens, and is at their (the plaintiffs') risk as to damage by rain." There is nothing in the contract, from which it can be fairly implied that the plaintiffs accepted any particular corn "in pens" as being two thousand six hundred bushels. To be sure that part of the corn in pens to the amount of two thousand six hundred bushels, was to be at the plaintiffs' risk as to damage by rain. This stipulation would require the plaintiffs to receive two thousand six hundred bushels of corn from the pens, although it might be damaged by rain after making the contract; but it would not require them to receive less than the two thousand six hundred bushels as the part specified to be in pens. There was no specific parcel of corn agreed upon as two thousand six hundred bushels. If the contract be construed to mean that the corn in the pens was to be taken at two thousand six hundred bushels, the plaintiffs would be entitled to it for that amount, whatever might be the true amount. Now, suppose that the corn, instead of falling short of the quantity specified, had greatly overrun it, would the plaintiffs have been entitled to it all, or for the two thousand six hundred bushels only? We think not. The contract required the delivery of ten thousand bushels, and only that amount, whether that in the pens fell short of, or overran the two thousand six hundred bushels.

But the counsel for the appellee say of the charge given, that, "its only tendency was to charge the jury that if there were two thousand six hundred bushels of corn in the pens when the contract was made, and none of it had been removed, but all was delivered to the plaintiffs, the shrinkage or loss must be borne by them, and not by the defendant." Admitting this to be the effect of the charge, it is still objectionable. There was to be a delivery of ten thousand bushels; that is, there must be that amount when delivered, in order to discharge the contract. A delivery of what had once amounted to ten thousand bushels, but which, at the time of delivery, had fallen short of that amount, in

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consequence of shrinkage or loss, would not be a compliance with the terms of the contract. The plaintiffs were to be at the risk of damage by rain, but they were still entitled to the full amount, although it might be damaged.

The jury should have been left to determine from the evidence, what amount of corn was actually delivered, as well from the pens as otherwise.

We think the Court erred in giving the charge which was given, and in refusing to give the charge asked by the defendant without modification. For this reason the judgment will have to be reversed.

There are other questions arising in the case, upon another branch thereof, which we will proceed to examine, as they may be important on the further trial of the cause. These questions arise on the plaintiffs' claim for damages in consequence of the four thousand seven hundred and fourteen bushels being damaged and unmerchantable. It appears by the evidence, that the above amount being other corn than that mentioned as being in pens, was damaged by rain to the extent of from five to ten cents on the bushel. The corn was delivered from *Watson's* warehouse, upon the cars furnished by the plaintiffs, at *New Bradford*, according to the stipulations of the contract. *Averett*, who superintended the procuring of the cars, and the weighing of the corn, on the part of the plaintiffs, told *Watson* that the corn was damaged and unmerchantable, and that if it were his he would like to have it out of the other end of the crib. He says he had no authority from the plaintiffs to receive the corn. The corn was taken, however, to the plaintiffs' distillery at *Edinburgh*, and there used in distilling. It appears that the plaintiffs were apprised of the unsound quality of the corn before it was taken from the cars at *Edinburgh*. There was no offer to return the corn, or notice to the defendant that the plaintiffs were dissatisfied with it.

The plaintiffs asked several charges on this branch of the case, which were refused. It is unnecessary to extend this opinion by inserting these charges at length, or examining them in detail, as we are satisfied that on the facts

proven there can be no recovery upon this part of the claim.

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Some of the charges were to the effect that the defendant might be held responsible as bailee for the safe keeping of the corn. The relation of bailor and bailee did not exist between the parties. The contract was executory (at least so far as all the corn, except the two thousand six hundred bushels, was concerned), and might have been discharged by the delivery of any corn of the quality mentioned. The defendant held no corn of the plaintiffs as their bailee, because no title to any particular corn passed to them by the contract. If the defendant is liable at all, it is for a breach of his contract to deliver the quality of corn specified.

No fraud is alleged or claimed, and in the absence of fraud or warranty, where a purchaser accepts and receives goods, he thereby not only waives the defects, but is concluded thereby so that he cannot recover thereafter for any patent and known defect. Here the defect in the corn was patent and known to the plaintiffs' agent at the time the corn was delivered, and known to the plaintiffs before it was unloaded from the cars and consumed by them in distilling.

The following authorities fully sustain the above proposition: *Hopkins v. Appleby*, 1 Stark. 477; *Milner v. Tucker*, 1 C. and P. 15; *Cash v. Giles*, 3 *id.* 407; *Dana v. Boyd*, 2 J. J. Marsh. 588; *O'Barmon v. Relf*, 7 Dana, 320; *Kerr v. Smith*, 5 B. Mon. 552; *Sprague v. Blake*, 20 Wend. 61. There are probably numerous other cases to the same effect, which have not come under our notice, and, perhaps, some of a contrary tendency; but the doctrine above stated is undoubtedly in accordance with the weight of authority.

The case of *Sprague v. Blake*, *supra*, involved a contract for the delivery of wheat, which was to be merchantable, at a specified price per bushel. A portion of the wheat delivered was unmerchantable, being broken wheat, black kernels, cockle, and cheat. One *Morgan* was the agent of the defendant in receiving wheat, but he was not present

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when the wheat was received, but it was received by his servants. The defendant sought to avoid paying more than the value of the wheat, being less than the contract price. The Court say: "There was here certainly no implied warranty; and, we clearly think, no express warranty. It is true, that the wheat was, by the terms of the agreement, to be merchantable. That is understood of every such contract, even without express terms, while it is executory. When the party comes, under such a contract, to deliver an inferior, unmerchantable commodity, which lies open to inspection, then is the time for the vendee to take his ground. He must then refuse acceptance, or at least as soon as he discovers what the quality of the article is, and offer to return it. When it is fully accepted, a new rule of construction arises. The executory contract is performed, no action lies upon that; and no defense, therefore, can be based upon it; but either must go upon an actual sale and delivery. * * * The acceptance was an assent that the terms of the executory contract were fulfilled."

In the case at bar, we need not determine whether *Averett*, who was the plaintiffs' agent for the purpose of procuring the cars on which to load the corn, and for the purpose of seeing the corn weighed, had not an implied authority to receive the corn, although no express authority was given, because the plaintiffs, afterwards, and with a knowledge of its unsoundness, received the corn and distilled it.

As before remarked, no fraud is imputed to the defendant; but it is insisted that the terms of the contract amount to a warranty that the corn was of the quality stipulated for in the contract. The case of *Sprague v. Blake, supra*, decides this question the other way, and, we think, correctly. Here was a contract for the delivery of a certain quality of corn, and if the defendant failed to deliver corn of the prescribed quality, he might be guilty of a breach of his contract, but he cannot be said to have warranted that the corn, when delivered and accepted, should be of the quality designated. Suppose that the

corn in question had been rejected by the plaintiffs, and the defendant had failed to deliver other corn of the quality specified, the defendant would clearly have been liable, not for a breach of warranty, but for a breach of his contract to deliver the prescribed quality of corn. Upon this point, the remarks of Lord ABINGER, in *Chanter v. Hopkins*, 4 M. and W. 398, are appropriate. He there said: "A good deal of confusion has arisen from the unfortunate use of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be a part of the contract; and, though a part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and a breach of such contract, a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty: there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it. So if a man were to order copper for sheathing ships—that is a particular copper, prepared in a particular manner—if the seller sends him a different sort, in that case he does not comply with his contract; and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so."

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The authorities cited by the appellants to show that the contract amounts to a warranty, do not sustain the position.

The first is *Bradford v. Manly*, 13 Mass. R. 139. This case simply decides that a sale by sample is tantamount to a warranty that the article sold is of the same kind or quality as the sample. This, we doubt not, is correct law, but it does not meet the case under consideration.

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Hastings v. Lovering, 2 Pick. 214, is the next case cited. This case decides that a sale note containing the statement, "sold A. two thousand gallons prime winter oil," amounted to a warranty that the article sold agreed with the description; but the decision was placed upon the ground that the contract was executed, and not executory. Certain specific oil passed, by the contract, to the purchaser, and herein the case differs widely from the one under consideration. There, the property having passed, if there was a breach at all, it must have been of warranty; but here, the only breach there could be, would be a failure to deliver the kind or quantity of corn specified, and this, we have seen, is a mere non-performance of the contract, and no breach of warranty. The same remark is applicable to the case of *Henshaw v. Robins*, 9 Met. 83, next cited.

Lamb v. Craft, 12 Met. 353, is not in point, or if it be, it is against the appellant, as it was held that there was no warranty in the case.

Martin v. Roberts, 5 Cush. 126, the last case cited upon this point, is not applicable, as no warranty was involved, but a question of fraud, growing out of false representations.

These are our views in relation to this branch of the case; but the judgment must be reversed for the reason before given.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. A. Huff, *Z. Baird*, and *J. M. La Rue*, for the appellants.

R. C. Gregory, *H. W. Chase*, and *J. A. Wilstach*, for the appellee (1).

(1) After setting forth the contract, pleadings, and evidence, counsel for the appellee proceeded as follows:

Upon the evidence, the Court instructed the jury, at the instance of the defendant:

1. That if they should believe the defendant delivered the plaintiffs ten thousand bushels, or over, of corn on the contract, and the plaintiffs received the same, there could be no recovery for a breach of the contract, although the corn received was inferior to that contracted for.

2. To create a liability upon a sale and delivery of corn, where the same is open to inspection of both parties, there must be either fraud on the part of the seller or a warranty to cover unsoundness.

3. If the jury should believe, from the evidence, that the plaintiffs received the corn in question in its unsound state, knowing it to be unsound, although they may have objected to it at the time, and have receipted for it as an unsound article, still no liability can exist on a contract for the delivery of merchantable corn; the corn having once been delivered on the contract and received, the contract is at an end, and no liability can arise, except such as may arise on the sale and delivery of personal property.

4. [The fourth was the first quoted in the opinion.]

The only errors assigned upon the record or alluded to in the appellants' brief, arise upon the instructions given for the appellee, and those which were asked for by the appellants and refused.

The first instruction for the appellee is simply, in effect, that if the defendant delivered the ten thousand bushels of corn upon the contract, and the plaintiffs received it upon the contract, though it was of an inferior quality, the contract is satisfied. We certainly are unable to perceive any valid objection to this proposition. Even though parties contract for the delivery of what is termed merchantable corn, it is certainly competent for the vendor to deliver, and for the vendee to receive, upon the contract, an inferior article. What amounts to merchantable corn may be, and frequently is, a matter of opinion to some extent, and reason and justice demand that the vendor, when he delivers corn as being upon the contract, should have it applied in discharge of his liability, and not be afterwards subjected to litigation as to its quality. Fair dealing requires that the vendee should take his stand, and either accept the article as in fulfillment of the contract, or refuse to receive it at all as being on account of the contract. This position is sustained by the authorities hereinafter cited.

Morton v. Tibbitt, 69 E. C. L. 436, cited by the appellants, does not sustain their objection to the first and third instructions given for the defendant. There is a numerous class of cases as to what acts of acceptance preclude the vendee of goods from objecting to their quality on the ground of their not being equal to sample or of the quality purchased; and the point decided in *Morton v. Tibbitt* was, that there might be an acceptance of goods so as to take the case out of the statute of frauds, and still not be such acts of acceptance as to destroy the right to object to the quality. In other words, that slighter acts of acceptance would take the case out of the statute of frauds than would deprive the vendee of the right to rescind the contract. *Chaplin v. Rogers*, 1 East, 192, and *Bushnell v. Wheeler*, cited in *Morton v. Tibbitt*, were also decisions as to what was an acceptance under the statute of frauds, and bear no analogy whatever to the case under consideration. The same remark is applicable to 2 Parsons, 327, 328, and notes, cited by the appellants. The complaint admits the acceptance of what corn was delivered, upon the contract; and we apprehend that the fact that the plaintiffs used the corn at their distillery, as shown by their own witnesses, and of which there was no dispute, left no ground to doubt but that they appropriated the corn. We are at a loss to perceive what counsel are seeking to prove by the citation of such authorities.

The second instruction given for the appellee is clearly unobjectionable. The appellants only object because it was not applicable to the evidence. In

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this they are mistaken. The corn was open to the inspection of their agents and themselves at the time it was accepted.

The third instruction given went further, perhaps, than was really necessary, under the proof, but it was in the precise language of cases hereinafter cited.

The objection to the fourth instruction, that the Court invaded the province of the jury in assuming facts, and in discriminating between witnesses, is unfounded. The instruction, taken as a whole, assumes no fact except that agreed upon by the parties in the written contract which is sued upon, and it shows that fact to be subject to be found in accordance with the proof. Its only tendency was, to charge the jury that if there was two thousand six hundred bushels of corn in the pens when the contract was made, and none of it had been removed, but all was delivered to the plaintiffs, the shrinkage or loss must be borne by them and not by the defendant. In that view, and the jury could have taken no other, the instruction is unobjectionable.

The objection that the Court erroneously refused to give the first and second instructions asked by the appellants, which were that the appellee, as bailee, trustee, or agent, was bound to keep the corn in good order, and is chargeable for damages to it by exposure to the weather, is subject to three conclusive answers:

1st. There is no such case made by the pleadings. The plaintiffs do not charge the defendant as bailee, trustee, or agent, but only as a vendor, and the issues are made accordingly.

2d. If the point was raised by the pleadings, still the instruction, as asked, would be improper, because the question then would be, not whether damage had occurred from exposure to the weather, but whether the defendant had been guilty of negligence as bailee, &c. To this effect are the authorities cited by the appellants. The roof of a warehouse might be blown off by an extraordinary storm, and corn exposed and damaged by the weather, without any negligence of the bailee, trustee, or agent.

3d. There was no specific corn sold except the two thousand six hundred bushels in the pens, and consequently none was ever in the appellee's hands as bailee, trustee, or agent for the appellants. The contract was entirely executory, except so far as the two thousand six hundred bushels of corn in pens was concerned; and any corn of the quality named could be delivered upon it, and any corn accepted would operate to discharge it.

The third instruction asked by the appellants was properly refused, because it proceeds upon the ground that the appellee was acting as the agent or trustee of the appellants, when he is charged as vendor, and the evidence shows him liable in that capacity, if at all.

The fourth, fifth, and eighth instructions asked for by the appellants, and refused by the Court, practically, though not very perspicuously, raise the main question in the case, to-wit: Whether upon a written contract of sale, and for the future delivery of merchantable personal property, a delivery by the vendor upon the contract, and an acceptance and use of an inferior article so delivered by the vendee, the contract is satisfied; or whether, in such case, the vendee may retain the property and sue for the damages occasioned by such inferiority.

The Court below held that the delivery of an article of inferior quality, where the defects are apparent and there is no fraud, and no express warranty at the time of delivery, and an acceptance and use of the same, amounts to a

satisfaction and discharge of the contract. Such, we contend, is the current of authority, though the appellants claim that there is an apparent conflict in the decisions of the Courts of different states upon the subject.

The appellants cite *Kellogg v. Denslow*, 14 Conn. R. 411, as being conclusive in their favor. They contend that the broad doctrine at p. 424, if applied to an executory contract, that "in all cases of fraud or warranty, where the vendee has the right of disaffirmance, he may keep silence, and bring his action, in affirmance of the sale, either for the fraud or upon the warranty," and "after a full acceptance by the vendee, with knowledge of the defects in the property, or neglect to obtain that knowledge, his right to annul the sale is extinguished, but his other remedies are unimpaired," is in conflict with the ruling below. It will be noticed, however, that the property in that case, was machinery to be used in a factory; that the defects complained of were such as could not be known by inspection, and would, from the necessity of the case, only be disclosed by actual use. Besides, there is a marked and very reasonable distinction to be taken between articles which require a high degree of skill, in order to determine their qualities, and those products of nature which may be tested by the most casual observer, upon simple inspection. In the case cited, if it could have been shown that the owner, at the time the machinery was brought to his factory, had full notice of its defects, and knew how it would work, and had still allowed it to be put up as in compliance with the contract, it is difficult to conceive what right he could have to complain. But after the machinery had become a fixture, and the parties could not be put *in statu quo*, it might seem a hardship to deprive him of the damages he had really sustained in consequence of unknown defects, although he had received it as in fulfillment of contract, and hence, the Court might feel inclined so to relax the rule as to meet such a case. But to lay down so broad a doctrine as is there enunciated, is to carry the matter entirely too far, and to greatly impair the authority of the decision; especially is this the case where it is in conflict with the decisions of other Courts of equal ability.

We proceed to cite the authorities which hold a doctrine contrary to what is claimed for this case.

In *Groning v. Mendham*, assumpsit for clover seed sold by sample, the defense was, that the order was for seed of the finest quality, and that the seed delivered was inferior; but Lord ELLENBOROUGH held, that the defendant must show an offer to return the seed, upon discovering that it was not the article ordered, before he could object to its inferiority. 2 Eng. C. L. 104.

The doctrine contended for by us, has been long settled in *Kentucky* and *New York*. In *Dana v. Boyd*, 2 J. J. Marsh. 538, the plaintiff had supplied the defendant with wool to be manufactured into cloth, according to the terms of a written contract, and brought his suit for a breach by the defendant. It appeared that the defendant had manufactured the goods and delivered them to the plaintiff, but the latter objected to them at the time, on account of their inferior quality, and gave a receipt with such objections stated in it. The Court held the following language: "But it may now be considered as a settled, general rule, that where the employer or purchaser receives the goods, he thereby not only waives the defects, but is concluded thereby, so that he cannot recover thereafter for any patent and known defect. * * * But when the defects are palpable, and are perceived at the time, he must reject the goods, and set aside the contract *in toto*, and go in for their full value, and cannot be

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allowed to accept and then bring his action for the bad quality. The seller or manufacturer may, in many cases, if the goods be rejected *in toto*, supply them with others; and in all cases, he may elect to pay the whole price, and make the best he can of the rejected articles in the market; and he ought not to be compelled by the employè's acceptance, to part with the goods, running the risk of such reduced price for them as a jury, in an action for the defect in quality, might allow. * * * * It results, then, that the plaintiff, by the reception of these goods, waived the right to recover for the bad quality thereof, and his having excepted to the bad quality at the time, did not preserve his right to recover for it." This reasoning is peculiarly applicable to the case before the Court. Had the appellants refused to take the corn from *Watson's* warehouse, the appellee would have refused to take it on his contract with *Watson*, but if the appellee is compelled to pay damages, he is driven to sue *Watson* on his contract, and it would be very questionable whether he could recover, because it would appear that he had not only taken the corn, but actually sold it as of merchantable quality.

It will be observed that the language of the third instruction given for the appellee, to which such strong objection is made, is taken from the opinion of the Court, in *Dana v. Boyd*, *supra*.

O'Barmon v. Relf, 7 Dana, 320, was a similar case, and the Court, after granting a rehearing upon a very able and earnest petition, hold that a covenant to deliver goods or chattels of a particular description or quality at a future day, is discharged by the delivery of any description or quality which the covenantee accepts, and having inspected them, or having a fair opportunity to do so, he can maintain no action afterwards on account of defects of quality; and in this respect, contracts of this description differ from contracts of warranty upon executed sales. The doctrine of these cases was recognized in *McKibben v. Bakers*, 1 B. Mon. 120, and expressly affirmed in *Kerr v. Smith*, 5 id. 552. We ask the attention of the Court to this latter case, as being identical in principle, with the one at bar. *Smith* had sold his crop of tobacco to *Kerr* under a special contract, and *Kerr* appears to have accepted it and given receipts that it was inferior in quality, and specified a lower price in them than that fixed by the contract. The Court held, that as the tobacco was delivered in a loose state, so that its condition could be ascertained, and the vendee received it, he could not object to its quality, or take it at less than the contract price.

Sprague v. Blake, 20 Wend. 61, contains a lucid exposition of the doctrine for which we contend. There, the plaintiff sold his wheat crop, of between three hundred and four hundred bushels, then partly threshed, to the defendant for one dollar per bushel, and agreed that it should be merchantable, and to deliver it at a specified place on *Seneca Lake*. Subsequently a part of the wheat was delivered, accepted, and paid for, and the residue, by a new agreement, was to be delivered at a warehouse in another place. One *Morgan*, the warehouseman, was the defendant's agent to receive wheat that season, but was not present when twenty-seven and forty-eight one hundredth bushels was delivered, but it was received by his servants. On opening the first bags, one of them told the plaintiff it was bad, but it was put into a bin containing six hundred or seven hundred bushels of other wheat. It appeared that the wheat was greatly inferior, and worth but 33 cents per bushel; but the Court instructed the jury that if they were satisfied that the wheat was received by the

defendant or his agent, they would find for the full contract price. They found a verdict for the full contract price accordingly. This ruling was held correct, and the Court, among other things, say: [Here followed the quotation as found in the opinion of the Court.]

The principles established in this case, which are amply sustained by sound reasoning, we deem conclusive upon three points in the case at bar:

1st. That the agreement to deliver merchantable corn, being executory, does not amount to a warranty express or implied.

2d. That the acceptance of the corn by the appellants' agent, *Averett*, who was authorized to receive it on cars, is binding on them; and,

3d. That the acceptance of the corn, with a full knowledge of its inferior quality, is a discharge of the contract.

But even if the contract should be construed to be a warranty that the corn was merchantable, then we insist, that it being a general warranty, it did not cover the defect complained of, because that defect was apparent and notorious. In *The President, &c. v. Wadleigh*, 7 Blackf. 104, Judge *Dewey* says: "The general principle is, that open, visible defects or qualities of goods sold and warranted, are not reached by the warranty, though they are inconsistent with its terms, for the seller is not supposed to warrant against defects and qualities whose existence is clear to the buyer and everybody else. * * * * The authorities referred to, show that the want of an ear to a horse, or of a roof to a house, is not a violation of a warranty that they were respectively perfect."

The counsel afterwards added the following:

Smith, in his *Mercantile Law*, at p. 519, says: "It sometimes happens that there is such a difference between the goods delivered and their description in the bargain, as would have justified the vendee in refusing to receive them; notwithstanding which, he has taken them into his possession and made use of them. In such a case it has been thought that his conduct would be taken to amount to a confession that the vendor had performed his contract, and that he would be obliged to pay the whole price stipulated."

Hopkins v. Appleby, 1 Stark. 478 (2 Eng. C. L. 183), is very much in point. We cannot better state the principle of law established by it than to quote the head-note or syllabus of the case: "The vendee of a merchantable commodity warranted to be of the best quality, proceeds to use it from time to time till the whole has been consumed, when the value of the article can be no longer ascertained, having given no notice to the vendor during this time of any defect in the article; and having deprived the vendor of the means of proving the value of the article by proper tests, the vendee is not entitled to recover on the ground of any alleged defect in the article."

HOLLAND and Others v. FULLER and Others.

After the dissolution of a partnership by the death of one of its members, its property, both real and personal, is subject to the trust of paying the debts of the firm, in the hands of a surviving member thereof.

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A. and B. indorsed the paper of the firm of *C. and D.* in a large sum, which remained unpaid at the dissolution of the firm by the death of *C.* They subsequently indorsed the individual paper of *D.* in a large amount, upon their faith in his ability and honesty alone. With the proceeds of such individual paper, *D.* paid off the partnership paper upon which they were liable, but without any arrangement with them to that effect. *D.* then failed, and assigned to *A. and B.* all his individual property, and certain town lots belonging to the firm of *C. and D.* Without these lots, there was not sufficient property in the assignment to pay the debts which *A. and B.*, by reason of their indorsement, had paid for *D.* *E., F.,* and others, the only creditors of the firm of *C. and D.* whose debts remained unpaid, having obtained judgments, brought this suit to set aside the assignment so far as the lots in question are concerned, and to subject them to the payment of their judgments. *Held*, that *A. and B.* were not, under the circumstances, entitled to be substituted in place of the original creditors of the firm. *Held*, further, that the assignment of the lots in question, was void; and that a judgment ordering them to be sold, and the proceeds applied to the payment of the firm debts, was right.

Thursday,
December 1.

APPEAL from the *Wayne* Circuit Court.

WORDEN, J.—Suit by appellees against appellants to set aside a certain conveyance, and subject the property to the payment of debts.

Trial by the Court, finding and judgment for the plaintiffs.

The proper steps were taken to present the questions involved, for decision here.

The material facts are believed to be as follows:

The plaintiffs are the only unpaid creditors of the firm of *Richard* and *Silas Tyner*, and have respectively recovered judgments against *Richard*, as the surviving member of the firm, upon their claims against the firm. The partnership of *Richard* and *Silas Tyner* commenced in 1834, and continued until the death of *Silas*, which occurred in 1852. The firm was insolvent at the time of the dissolution by the death of *Silas*. At the time of the dissolution, the partnership owned lot No. 22, in *Cambridge City*. They had also purchased lots numbered 9, 10, 11, and 12, on which they had paid, out of the partnership effects, two-thirds of the purchase-money. After the death of *Silas*, *Richard* paid the remaining third of the purchase-money, and “knowing that the firm was insolvent, and that he would have the debts to pay,” took the deed for them in

his own name. Afterwards, in 1854, *Richard*, being insolvent, made a general assignment of his effects, including, amongst other property, the lots above mentioned, to *George Holland* and *Abner McCarty*, for the benefit of creditors. The object of the suit was to set aside the assignment so far as the above-mentioned lots are concerned, and to subject them to the payment of the plaintiffs' judgments.

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It appears that at the death of *Silas*, the firm was indebted in bank in the sum of 51,500 dollars, and also to *Roots* and *Coe* in the sum of 9,500 dollars. For most of the indebtedness of the firm, either *Holland* or *McCarty* was liable, being on the paper. After the death of *Silas*, *Richard* executed his own individual paper, with *Holland* and *McCarty* as his sureties, had the same negotiated, and applied the proceeds to the payment of the above sums. The firm was also indebted to other persons about 20,000 dollars, which, after the death of *Silas*, was paid by *Richard*, in the same manner, except those mentioned in the complaint. At the time of the assignment above mentioned, *Holland* was on about 104,000 dollars of *Richard's* paper, and *McCarty* on about 75,000 dollars of the same paper. Between the death of *Silas* and the date of the assignment, there had been paid on the partnership debts, but about 10,000 dollars out of the assets of the firm. The value of the property embraced in the assignment was from 55,000 to 75,000 dollars. The individual property left by *Silas*, together with the firm property, would not pay the firm debts, by 20,000 dollars. At the death of *Silas*, *Richard*, upon an estimate, supposed himself to be worth 15,000 or 20,000 dollars, over and above his own and the firm debts. After the death of *Silas*, the indorsements and acceptances of Messrs. *Holland* and *McCarty*, above referred to, were made upon the credit of *Richard*, and upon their faith in his ability and honesty. Whenever he asked them to indorse for him, they did so without inquiry, and without explanations being made. They indorsed the paper of the firm in the same way.

The assignment in question provides for the sale, &c.,

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of the property, and the payment of creditors, subject to the provisions and trusts therein made. The second provision is as follows:

“2d. The following named persons are herein declared to be preferred creditors, to-wit, *Abner McCarty, Enoch McCarty, Nathan D. Gallion, Roots and Coe, Ezekiel Tyner* and *George Holland*, of the first class, to the extent following: the persons above named as preferred creditors of the first class, are now liable upon bills of exchange, notes, and other mercantile paper, negotiated at sundry banks, and by divers private bankers and brokers, for the benefit of said *Richard Tyner*, and for the benefit of *Tyner* and *Childers*, on which said parties above named are bound and liable as aforesaid as drawers, indorsers, acceptors, and payors. It is, therefore, hereby expressly declared that said funds so as aforesaid realized from said personal and real estate, shall be applied and paid in such manner as to save harmless, and fully and completely indemnify the said parties on such paper as they are so as aforesaid legally bound to pay, in the order following, that is to say, first, to indemnify and save harmless the said *Abner McCarty* upon all such paper of the aforesaid character and description as he is legally bound to pay, as first preferred creditor of this class. Second, to indemnify and save harmless, the said *Enoch McCarty, Nathan D. Gallion, Roots and Coe, Ezekiel Tyner*, and *George Holland*, upon all such paper of the aforesaid character and description as they are legally bound to pay, in proportions equal to their respective liabilities thereon.”

The assignment does not provide for indemnifying *McCarty* and *Holland* against any liability as indorsers or sureties of *Richard* and *Silas Tyner*.

It appearing on the trial that the plaintiffs are the only creditors of *Richard* and *Silas Tyner*, whose claims have not been paid, the Court adjudged that the undivided half of said lot 22, and the undivided third of the other lots mentioned, be sold to satisfy the plaintiffs' claims, and that the proceeds, after paying costs, be applied *pro rata* thereon.

The counsel for the appellants claim that but two questions arise for our determination: Nov. Term,
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First. Was this property, belonging to the firm, to be regarded as real or personal estate? and if real, descending to the heirs at law of *Silas Tyner*, under what conditions did his heirs receive it? HOLLAND
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Second. Can *Holland* and *McCarty*, under the circumstances of this case, be substituted in place of the original creditors of the firm?

For the purposes of this case, we deem it wholly unnecessary to determine how far, and under what circumstances, real estate owned by a partnership, will be treated as personalty. Whatever may be the rights of each partner to dispose of the partnership effects, in good faith, during the existence of the partnership, it is well settled that after dissolution, one member of the former firm cannot appropriate the joint property to the payment of his own individual debts, to the exclusion of the creditors of the firm. This doctrine is as applicable to real, as to personal estate. In the case of *Matlock v. Matlock*, 5 Ind. R. 403, it is held "that real estate acquired with partnership funds for partnership purposes, must be considered as partnership property, and first applied to the satisfaction of the partnership debts." *Vide McCulloch v. Dashiell*, 1 Am. Lead. Cases, 460, and notes.

The principle is, that upon a dissolution of the partnership there can be no proper distribution of the effects among the members of the firm, until the partnership debts are paid; or, in other words, the partnership effects are charged with the partnership debts, and the rights of the several members of the firm to the effects of the partnership, are subject to the rights of the partnership creditors. Mr. Justice STORY states the proposition in the following terms: "In short, in case of a dissolution, each partner holds the joint property clothed with a trust to apply it to the payment of the joint debts, and subject thereto, to be distributed among the partners according to their respective shares therein." Story's Part., § 360.

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In *Nicholson v. Leavitt*, 4 Sandf. (S. C. R.) 252, it was held that an assignment by partners, of partnership property, giving preference in payment to the creditors of one of the partners over the creditors of the firm, was not, for that reason, void; but that such preference violated a rule of equity, was invalid, and might be avoided by a suit on behalf of such partnership creditors.

We come to the second question—Can *Holland* and *Mc Carty*, under the circumstances, be substituted in place of the original creditors of the firm? In our opinion, the doctrine of substitution is not applicable to the case.

It is insisted that the successive securities given by *Holland* and *Mc Carty*, were but a continuation of the original debts of the firm; and, therefore, that they should be regarded now as sureties of the firm, and entitled to occupy the position of creditors of the firm. The facts proven, however, are at variance with this position. To be sure, at the death of *Silas*, both *Holland* and *Mc Carty* were liable upon the paper of the firm; but that liability has been extinguished by the payment of the paper by *Richard*. The new paper made by *Richard*, and secured by *Holland* and *Mc Carty*, was not given in novation of the old. It does not appear to have been made to the parties that held the original debts. It was negotiated in the market, and the avails applied in payment of the old debts. It does not even appear that at the time the new paper was made, *Holland* or *Mc Carty* knew the purpose to which *Richard* intended to apply the proceeds of it. They indorsed the new paper upon the credit of *Richard*, and upon their faith in his ability and honesty, without inquiry or explanations, and without any understanding or agreement that the proceeds should be applied to the payment of the firm debts for which they were liable. At this time, *Richard* was apparently solvent, and worth 15,000 or 20,000 dollars over and above his own and the firm debts. *Holland* and *Mc Carty* saw proper to become surety for *Richard* alone, and he having paid the partnership debts for which they were liable, they remain sureties only for *Richard*, and can claim

no rights as sureties for the firm. The assignment itself entirely excludes the idea of indemnity to them as sureties of the firm of *Richard* and *Silas Tyner*. This provides for indemnifying them against their liability on paper negotiated "for the benefit of said *Richard Tyner*, and for the benefit of *Tyner* and *Childers*." No allusion is therein made to any liability as sureties of *Richard* and *Silas Tyner*. *Richard*, in his testimony, says that "the assignment referred to was executed to secure Messrs. *Holland* and *Mc Carty* from liability on the new paper thus given in extinguishment of the old indebtedness of *Richard* and *Silas Tyner*." The assignment was undoubtedly intended to secure them from liability on the new paper; but the new paper cannot be said to have been given in extinguishment of the old indebtedness. It was the payment of the old indebtedness, by *Richard*, that operated as an extinguishment. Perhaps, had the new paper been given in novation or renewal of the old, it would be considered as essentially the same debt; but such, we have seen, was not the case. The new paper, so far as appears, was executed without any reference to the old whatever, and had no connection with it. The proceeds of the new, upon negotiation, were applied by *Richard* in payment of the old; but this fact will not entitle *Holland* and *Mc Carty* to be deemed sureties of the firm, the debt for which they were sureties being thus canceled.

We have seen that at the time of the dissolution, the firm owned lot No. 22, and had paid for two-thirds of the other lots. The Court only ordered one-half of the above interests to be sold. This, we suppose, was intended to embrace the individual interest of the deceased partner in the lots. Whether the whole of lot No. 22, and the whole of the partnership interest in the other lots might not have been subjected to the payment of the plaintiffs' claims, is a question not before us, as the plaintiffs make no objection to the judgment. The defendants have no cause to complain of the judgment in this respect.

We see no error in the proceedings for which the judgment should be reversed.

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Per Curiam.—The judgment is affirmed with costs.
J. Perry, G. Develin, and G. Holland, for the appellants (1).
J. S. Newman and J. P. Siddall, for the appellees (2).

(1) Extract from the brief of the appellants:

Two questions arise, and only two, in this case, for the Court's determination, to-wit:

First. Was this estate belonging to the firm, to be regarded as real, or as personal estate? and if it was real estate, and descended to the heirs at law of *Silas Tyner*, under what conditions did his heirs take the estate?

Second. Can *Holland* and *McCarty*, under the circumstances of this case, be substituted in the place of the original creditors of the firm?

1. All real estate purchased for partnership purposes, and with partnership funds, is, as between the partners, and them and their creditors, to be regarded as personal property, whether a special agreement to that effect did, or did not, exist between the partners. 1 Pars. on Cont., pp. 125 to 129, and notes.—Pars. on Merc. Law, pp. 172 to 174, and notes.—Gow on Part., 36. See Story on Part. 127, and following pages. See, also, Pars. on Cont., p. 126, note (d).

But whatever doubts may exist as to the character of the estate thus purchased with partnership funds and for partnership purposes—whether it is considered as real or personal, it can make no difference in this case. If the estate descended to the heirs of *Silas Tyner*, the heirs received it charged with a trust in favor of the partnership, and the creditors of the partnership; and a Court of equity would compel a sale and conveyance whenever such a sale was required for the payment of the firm debts. See the authorities above cited.

2. It has been insisted by the defendants, that if the bills and notes of the partnership, at the death of *Silas Tyner*, were afterwards renewed by *Richard Tyner* and the sureties, they ceased to be the debts of the partnership, and thereby became the individual debts of *Richard Tyner*, and if he made an assignment for the payment of those debts, that the assignment as against partnership creditors, was void. There certainly is nothing in this objection. The successive changes were but a continuation of each debt; and when it was paid off by *Holland* and *McCarty*, they could claim to be substituted in place of the creditors whose debts they had paid. 2 Bouv. Inst. 69, 70.—1 Story's Eq., §§ 633 to 636, 472 (note 1), 489.—5 Ind. R. 492.—4 id. 66.—7 Blackf. 358.—2 Johns. Ch. 554.—4 id. 123.

(2) Extract from the brief of the appellees:

The legal estate of a partner in realty belonging to the partnership, descends to his heirs and widow, but subject to a trust and equitable lien in favor, first, of the creditors of the firm, and, secondly, to any balance that may be due the surviving partner. See Pars. Merc. Law, pp. 172, 173, and notes.

This lien upon the real estate of the partnership, is only an equitable one, and can only be enforced in equity. The deed or assignment of the surviving

partner will not convey the interest of the deceased partner. *Id.* 175, and conclusion of note 1.—Burr. on Assign. —.

It is true that in equity the real estate is treated as personalty, and is subjected to the payment of the firm debts, free from the claim of the widow for dower. But on the death of a partner, where real estate has been held by the firm, the legal title must vest somewhere, and as it does not vest in the surviving partner by the right of survivorship, it must vest in the heirs and widow, subject, however, to be reached, or at least so much of it as may be necessary, by proceedings in equity, and appropriated to the payment of the debts of the firm. The appellant, in his brief, assumes the ground that real and personal property belonging to the partnership are, in all cases, to be treated as personalty. The authorities cited by him do not sustain his position.

Mr. *Parsons*, in his *Mercantile Law*, p. 172, cited by appellants, uses the following language: "A partnership may hold real estate, as well as personal estate. But the rules of law in respect to real estate, as in relation to title, conveyance, dower, inheritance, and the like, make some difference. As far, however, as is compatible with these rules, it seems to be agreed that the real estate of the partnership shall be treated as if it were personal property, if it have been purchased with the partnership funds, and for partnership purposes."

It is not compatible with the above rules, that real estate may be conveyed like personalty. The legal title vests in the heirs and widow, and can only be reached by such proceedings as were resorted to in this suit. The complainants are the only creditors of the old firm, and they have asserted their equitable claim to the firm real estate, in satisfaction of their claims. The assignment only conveys the legal interest of *Richard* in the real estate to his assignees, and as to that interest, it is gone from us, but the legal interest of *Silas* does not pass by the assignment, and that interest, the Court decreed, should be sold, and the proceeds applied to the payment of the firm debts.

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BANKS v. WERTS.

A contract for the sale of goods on *Sunday* is void; but the parties by subsequently acting upon it as a subsisting and valid agreement may ratify it.

APPEAL from the *Miami* Circuit Court.

Thursday,
December 1.

DAVISON, J.—*Banks* sued *Werts* to recover a stock of goods in the *Hartpence* store-room, in *Miami* county.

The answer to the complaint admits the defendant's possession of the goods, denies that they belonged to the plaintiff, and alleges that he, defendant, is the sheriff of

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said county, and that by virtue of two executions in his hands, against one *Lewis Wilkinson*, he levied upon the goods in contest as *Wilkinson's* property, and holds them under that levy.

Reply in denial of the answer.

The jury found specially, in answer to interrogatories propounded by the Court; also a general verdict for the defendant; and the Court, having refused a new trial, rendered judgment.

The record presents these facts: On *Saturday, January 26, 1856*, *Wilkinson* proposed to sell the goods to the plaintiff; the terms of sale were then talked over; and on *Sunday, January 27*, a bill of sale of the same goods was signed and delivered to the plaintiff, and with it the keys of the store-room in which the goods were situate. The plaintiff was to pay *Wilkinson* 2,100 dollars for the goods—1,000 dollars of which was to be paid by the surrender of notes for that amount then held by plaintiff against *Wilkinson*, and the residue to be paid in the payment of certain specified debts which he, *Wilkinson*, then owed, amounting to 1,100 dollars. On *Monday, January 28*, the plaintiff opened up the store, and on the next day, *Tuesday*, surrendered to *Wilkinson* the notes, amounting to 1,000 dollars. The plaintiff continued in possession of the goods until the 10th of *April, 1856*, when they were levied on by the defendant as sheriff, &c. During the time the plaintiff so held the goods in possession, *Wilkinson* was frequently present in the store-room, and saw him dispose of various articles of the store goods, but made no objection. It was proved that the plaintiff, in addition to the surrender of the notes, had, afterwards and before the levy, paid some of the debts which he had agreed to pay.

The plaintiff, at the proper time, moved this instruction:

“Although a contract entered into on *Sunday* is void, yet if the parties, on a proper day, affirmed the contract by complying with its terms, it thereby became their contract on a proper day, and binding on them.”

The Court refused so to instruct the jury, but instructed as follows:

“A contract made on *Sunday* is absolutely void, and no subsequent ratification can give it validity.”

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Are these rulings, when applied to the case made by this record, correct?

BANKS
v.
WERTS.

It has been often decided that a contract entered into on *Sunday* is void, on the ground that it is an act of common labor, the exercise of which on that day is forbidden by the positive provisions of a statute. *Link v. Clemmens*, 7 Blackf. 479.—*Reynolds v. Stevenson*, 4 Ind. R. 619. And further, the general rule is, that a void contract is not susceptible of ratification. *The State v. The State Bank*, 5 Ind. R. 353.—Story on Agency, pp. 240, 241.

If, then, the case before us rested on the mere fact of the sale and delivery of the store goods on *Sunday*, no Court would lend its aid to enforce the contract. But there is a class of cases which assume the position that the parties to such void contract may, on a subsequent day, so act in reference to its performance as to ratify it, and, in effect, make it a new contract.

Thus, in *Williams v. Paul*, 6 Bing. 653, the contract was executed on *Sunday*, the property was retained by the defendant, and afterwards, on another day, he promised to pay for it. The Court held that the subsequent promise was sufficient on a *quantum meruit*, or as a ratification of the agreement made on *Sunday*.

So, in *Summer v. Jones*, 24 Verm. R. 317, the plaintiff, on *Sunday*, sold a horse to the defendant, for which, on the same day, he gave the plaintiff his note. Afterwards he made two payments on the note, and retained the property without offering to return it. *Held*, that these payments on the note, accompanied by the retention of the property, was a subsequent ratification of the contract, and that the plaintiff was entitled to recover on the note. See, also, *Adams v. Gay*, 19 Verm. 353; *Sargent v. Butts*, 21 *id.* 99; *Clough v. Davis*, 9 N. Hamp. 500; *Smith v. Bean*, 15 *id.* 576.

In *Adams v. Gay*, *supra*, the Court say: “Contracts made on *Sunday* should be held an exception, in some sense, from the general class of contracts which are void

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for illegality. They are not tainted with any general illegality, but are illegal only as to the time in which they are entered into. It is not sufficient, to avoid them, that they have grown out of a transaction on the *Sabbath*. And although closed upon that day, yet if affirmed upon another day, they then become valid."

These decisions relate alone to contracts made on *Sunday*. They proceed on the ground of a retention of the property, and subsequent ratification by the parties; and in principle they seem to be correct. Do they apply to the case at bar?

Here the terms of the sale were agreed on, and the property delivered to the plaintiff on *Sunday*; but he retained possession until it was levied on by the sheriff, and, in the meantime, with the assent of the vendor, sold portions of it in the ordinary course of business; and, in addition, on a day subsequent to the sale, paid, and the vendor received, at least one-half the consideration for which he sold the property. This, in view of the authorities to which we have referred, was, obviously, a ratification of the contract by the parties. And the result is, the instruction moved by the plaintiff should have been given, and that given must be held erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

N. O. Ross and *R. P. Effinger*, for the appellant.

HANNUM v. CURTIS, Administratrix.

The statement of a claim against a decedent's estate need not be a regular complaint under the ordinary rules of pleading; but is sufficient if it shows the nature and amount of the demand, and enough to bar another action therefor.

If a party is sued for money placed in his hands for a special purpose, he must show to what extent he has complied with his undertaking to apply it to such purpose; for payments made in pursuance thereof are peculiarly

within his own knowledge; and the same rule applies to his personal representative after his death.

Where a party pleads a fact affirmatively, the *onus* of proving it rests upon him.

Where a receipt, introduced in evidence, does not appear to be related to the matters involved in the suit, it is error to refuse to charge the jury that such receipt "is no evidence of a settlement of any account, other than the items therein stated."

If money be placed in the hands of an agent who dies, the principal cannot maintain an action therefor against his administrator, without first demanding "an accounting;" nor does the placing of a claim for such money on the appearance docket operate in lieu of such demand.

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HANNUM
v.
CURTIS.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Thursday, December 1.*

DAVISON, J.—This was an action founded upon a claim on file in the Court of Common Pleas, against the estate of *John Curtis*, deceased.

Hannum was the plaintiff below.

The claim is for various items of carriage work, amounting to 33 dollars; also for 350 dollars, money placed in the decedent's hands to pay taxes. As evidence of the receipt of the money, two instruments in writing were filed with the claim. They read thus:

"*Springfield, June 21, 1844. Received of Leonard Hannum fifty dollars, to apply on amount paid for taxes, and to be paid in the states of Indiana and Illinois, and which I am to forward full statement of amount soon as I can get the receipt for taxes of 1844. John Curtis.*"

"*Received of Leonard Hannum 300 dollars, which I am to pay taxes on his land in Illinois, and the balance to be applied on amount due me. Albany, December 5, 1849.*

"*John Curtis.*"

Appended to the claim, there is an affidavit, alleging that payments, from time to time, had been made on the claim; that a balance was due to the plaintiff, but the decedent having rendered no account, he was unable to state how much was due.

To this claim, so far as it relates to the receipts and several amounts therein set forth, the defendant demurred, on the ground that it did not show that the decedent had

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failed to comply with his undertakings as stated in the receipts, or to what extent he had failed.

The Court sustained the demurrer; and the plaintiff then amended his affidavit, setting up that *Curtis*, the decedent, was his agent for the payment of taxes in *Indiana* and *Illinois*; that when the moneys specified in the receipts were placed in the hands of *Curtis*, he represented that he had advanced money in the payment of plaintiff's taxes, and that he needed the money so placed in his hands to be applied on the sum by him advanced, and also on future taxes; that *Curtis* promised to furnish the receipts taken by him for money paid on taxes; but he has never rendered any account whatever of such payments, &c.

A demurrer to the claim, as supported by the amended affidavit, was also sustained. And the plaintiff filed an additional amendment to the same affidavit, whereby it is alleged that, having made diligent inquiry, by letter, relative to payments made by *Curtis* on account of taxes in the state of *Illinois*, he could find no payments made by him entered on the tax duplicates; that he has been compelled to redeem his lands—they having been, through the negligence of *Curtis*, sold for taxes; and that, during the time he acted as plaintiff's agent, he has not, so far as plaintiff can ascertain, paid more than 74 dollars; that he, plaintiff, believes that, in addition to his account for carriage work, there is due to him 276 dollars, with interest from the date of said receipt; and that since he has been compelled to redeem his lands sold for taxes, he does not believe that his agent is entitled to commission, &c.

Upon the filing of this additional amendment, the defendant again demurred, and the Court sustained his demurrer. And thereupon the plaintiff further amended by alleging that he believed that the estate of *John Curtis* was indebted to him in the sum of 276 dollars, with interest from the 5th of *December*, 1849, the date of the last receipt, and also in the sum stated in his account for carriage work; and that he knew of no claim in favor of that

estate, and against him, except the 74 dollars, as above stated, &c. Nov. Term,
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To the claim thus supported by the affidavit as amended, the defendant answered—

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CURTIS.

1. By a general denial.

2. That the decedent, in his lifetime, paid over and accounted for all the moneys specified in said receipts.

Reply in denial of the second paragraph of the answer.

The issues were submitted to a jury, who found for the plaintiff 22 dollars, 50 cents. And, over a motion for a new trial, there was judgment, &c.

The plaintiff appeals to this Court.

The errors assigned, so far as they are noticed in the appellant's brief, relate to the action of the Common Pleas in sustaining the demurrers, in refusing instructions moved by the plaintiff, and in giving instructions asked for by the defendant.

As we have seen, the ground of demurrer is, that the claim does not show that the decedent had not failed to comply with his undertakings, &c., or to what extent he had failed.

The statute relative to the settlement of decedents' estates, provides that a succinct statement of the nature and amount of every claim against the estate of any decedent must be filed in the office of the clerk of the Court of Common Pleas; that such clerk shall enter upon the appearance docket of that Court a list of all such claims; and that whenever any claim against such estate shall have been so placed on the appearance docket of said Court ten days before the first day of the next ensuing term thereof, the administrator shall admit, or refuse to admit, the claim, &c.; and if the same is not admitted before the last day of that term, it shall be transferred to the issue docket of said Court, and shall stand for trial at the next term thereof, as other civil actions, &c. It is further provided, that unless such claim shall have the affidavit of the claimant thereto attached, to the effect that the same is justly due and wholly unpaid, no cost shall be recovered by said claimant in any suit for the recovery of such claim,

Nov. Term, 1859. &c. 2 R. S. p. 260, § 62.—Acts of 1855, pp. 81, 82, §§ 1, 2, and 5.

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v.
CURTIS.

Thus it will be seen that the claimant, unless he files an affidavit in the mode prescribed by the statute, cannot recover his costs of suit. Still, however, without such affidavit, the claim as filed may constitute a cause of action. The statute to which we have referred, does not require a regular complaint under the ordinary rules of pleading, but merely a succinct statement of the claim, which, it seems to us, will be sufficient when it apprises the defendant of the nature of the claim, of the amount demanded, and shows enough to bar another action for the same demand. These have been ruled to be the requirements of what the law denominates a concise statement of a cause of action in justices' Courts, and we perceive no reason why they may not be effective as the proper elements of the statement of a claim against a decedent's estate. R. S. 1843, p. 870, § 39.—4 Blackf. 12.—5 *id.* 40.—11 Ind. R. 203.

But it is insisted that the claim, in this case, fails to show how much was due, or what sum the plaintiff demanded. This position is not well taken. The several amounts of the account for carriage work, and of the money placed in the decedent's hands, are distinctly stated, and it was the duty of his administratrix, while the statement remained on the appearance docket, to admit or refuse to admit the claim. It is true, the claim, as stated, does not show that the money so placed in the hands of the decedent had not been used as stipulated in the receipts. Nor was such a showing essential to its validity. Having agreed to use the money received by him in the payment of taxes, it was incumbent on the defense to show to what extent he had complied with his agreement; because payments in discharge of it, if any were made, were facts peculiarly within his knowledge, and must, therefore, be held to be presumptively within that of the defendant as his administratrix. We are of opinion that the statement of the claim, in the case before us, unaided by the affidavits, constituted a sufficient cause of action.

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Consequently the demurrers should have been overruled. 1 Phil. Ev. (4 Am. ed.) 823.

At the proper time, the plaintiff moved the Court to instruct as follows:

"The receipt for 50 dollars, given on the 21st of June, 1844, is presumed to be paid by the one given December 5, 1849; but it is incumbent on the defendant to show the application of the money, and to the amount in which she has failed to show such application, she is liable in her representative capacity," &c.

This instruction was refused, and the plaintiff excepted. Mr. *Greenleaf* says: "The obligation of proving any fact lies upon the party who asserts the affirmative of the issue." 1 Greenl. Ev., § 74. This, as a general rule, is obviously correct. In the case at bar, the plaintiff produced the receipts, showing the money in the decedent's hands to be paid over to the use of the plaintiff. It seems to follow that, in view of the rule just cited, the proof of its application to the purpose agreed on by the parties, rested on the defendant. But the defendant, in her answer, alleges affirmatively that the decedent, in his lifetime, paid over and accounted for all the money specified in the receipts; and having thus assumed the affirmative of the issue, she was evidently bound to prove the facts alleged in her pleading. The instruction was applicable to the case, and should have been given.

During the trial, the defendant gave in evidence a writing in these words:

"*John Curtis to Leonard Hannum, Dr.: 'To two grain carts, 30 dollars—60 dollars. Received payment,*

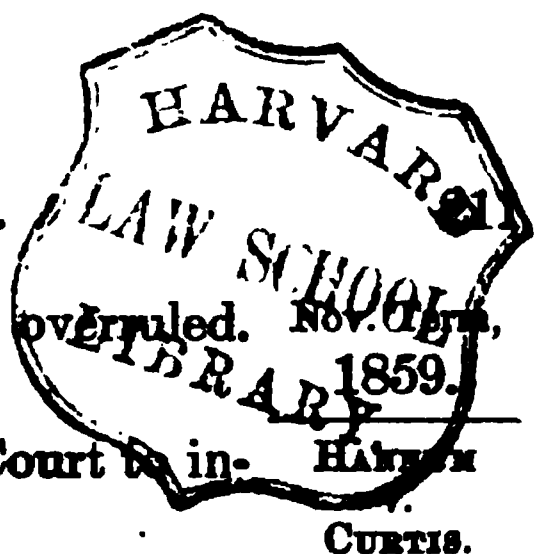
"L. Hannum,

"Lafayette, September, 1853. per Daniel Hannum."

In reference to this evidence, the plaintiff moved the following instruction, which the Court refused, viz.:

"The receipt given by *Leonard Hannum*, the plaintiff, by *Daniel Hannum*, to *John Curtis*, the decedent, is no evidence of a settlement of any account other than the items therein stated."

It does not appear that the receipt related to the deal-



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ings between the parties involved in this suit, and for that reason the instruction should have been given. As it stands unconnected with the several matters in issue in the cause, it could furnish no presumption of a general settlement of the accounts in contestation before the jury. The instruction, in our opinion, gave a proper exposition of the evidence to which it refers, and its refusal was, therefore, erroneous.

The Court, at the instance of the defendant, charged that "the money having been placed in the hands of the decedent, as the plaintiff's agent, no action would lie for its recovery, until a demand made for an accounting." The rule indicated by this instruction, has been fully recognized by this Court.

In *Judah v. Dyott*, 3 Blackf. 324, "The proof was, that *Brandon* had had a certain quantity of medicines in his possession belonging to *Dyott*, which the former had received from the latter to be sold on commission, and that *Brandon* sold the principal part of the medicines, if not the whole, before his death." The Court say: "This evidence was not sufficient to maintain the action. *Brandon* was merely the agent of *Dyott* for the sale of the medicines, and was not liable to his principal for the proceeds of the sale without a special demand previously made; nor is his administrator liable without a previous demand on himself or his intestate." See, also, *Armstrong v. Smith*, 3 Blackf. 251; *Philips v. Wills*, 2 Ind. R. 325.

It is, however, insisted, that these decisions do not apply to the case at bar; that the claim in question, having been placed on the appearance docket, operated in lieu of a demand to account. We think differently. The claim, as it stood on that docket, contained no such demand, but simply informed the administratrix of a cause of action against her, on account of a debt due the claimant from the estate of her intestate.

The case of *Judah v. Dyott*, *supra*, is, in our opinion, decisive of the question under consideration, and the result is, the Court, in giving the instruction, committed no error.

For the sustaining of the demurrers, and the refusals to instruct, as moved by the plaintiff, the judgment must be reversed.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

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APOLIS, &C.,
RAILROAD Co.
V.
WRIGHT.

J. M. LaRue and ——— *Royse*, for the appellant.

R. C. Gregory, H. W. Chase, and J. A. Wilstach, for the appellee.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
WRIGHT.

Suit against a railroad company to recover for cattle killed by their engines.

The right to recover was rested on the following facts: Near where the stock was killed, was a small brook, over which the company had built a culvert. Below the culvert the plaintiff had a pasture in which he kept his cattle. Across the brook, below the culvert, he had made a fence of long poles. A flood came and floated driftwood through the culvert, against the fence. To prevent the accumulation of drift above the culvert in such quantities as to endanger its safety, the company aided in its passage. At sunset, the plaintiff knew the exposed situation of his fence, but would not remove his cattle. At night, the fence being borne away, the cattle passed upon the road and were killed. *Held*, that the plaintiff could not recover.

APPEAL from the *Shelby* Court of Common Pleas.

Friday,
December 2.

PERKINS, J.—Suit commenced in the Court of Common Pleas, by *Wright*, against the *Indianapolis and Cincinnati Railroad Company*, to recover for stock killed by the engines of the company.

Judgment below for the plaintiff.

No attempt was made to prove that the stock was killed through any negligence on the part of the company in running the engines; but the right to recover is rested on the following facts:

Near the point where the stock, consisting of seven head of cattle, was killed, was a small creek. Over this creek the railroad had built a culvert. Down the creek from this

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culvert, the plaintiff, *Wright*, owned the pasture field in which he kept the seven head of cattle; and across the creek, below the railroad culvert, was a fence made of long poles. There came a freshet, and it washed down drift wood, which, passing through the culvert, floated against the poles stretched across the creek. To prevent this drift-accumulating on the upper side of the culvert in such quantities as to endanger its safety, the railroad company aided the drift in its passage through the culvert. The drift floating against the poles, both were borne away by the torrent of water, and thus a gap left, on the subsidence of the water, through which the cattle passed, in the evening, onto the railroad track, and were, directly after, killed by a passing train. *Wright* knew, at sundown of that day, the exposed situation of the poles across the creek, and had another unexposed pasture into which he might have removed his cattle, but would not do it.

The facts in this case lay no foundation for liability on the part of the railroad company. The water of the creek flowed in its natural current. The freshet was the act of God, and the drift, its natural consequence. The railroad company did not divert the drift from its natural course, but so guided it in it, as to prevent injury to their own, without increasing the danger to the property of others. If the poles could not resist the natural flowage of the drift, they would hardly have withstood the accumulated drift and culvert which would have finally been swept against them, if the drift had not been passed off by itself.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Scobey, for the appellants (1).

D. M. Donald and *A. G. Porter*, for the appellee.

(1) Mr. *Scobey* cited 3 Blacks. Comm. 209, 211; *Wells v. Howell*, 19 Johns. 385; *The Lafayette, &c., Railroad Co. v. Shriner*, 6 Ind. R. 141; *Williams v. The New Albany, &c., Railroad Co.*, 5 id. 111; *Crookshank v. Kellogg*, 8 Blackf. 256; *Porter v. Allen*, 8 Ind. R. 1; 2 Pars. on Cont. 454; 2 Greenl. Ev., § 256; Sedgw. on Dam. 66 to 71; 17 Pick. 284 to 288, 453; 7 Hill. 61; 2 Seld. 85; 2 Met. 615; 7 Cush. 522; 5 Denio, 306; 8 Grat. 16; 14 Barb. 232; 20 Eng. Law and Eq. 410; 18 id. 557; 4 Blackf. 348; 2 Ind. R. 597; 3 id. 271.

MORGAN v. THE STATE.

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v.
THE STATE.

13	215
168	311
168	313

When a valid indictment has been returned by a competent grand jury to a Court having jurisdiction, and the defendant has been arraigned and has pleaded, and a jury has been impaneled, sworn, and charged with the cause, and all the preliminary things of record are ready for the trial, the jeopardy contemplated by the constitution has attached, and the defendant is entitled to a verdict.

The defendant may, by consent, or by acts from which consent will be presumed, waive this constitutional right; or unforeseen occurrences may intervene which will operate to withdraw the privilege.

But where the indictment is valid, and the proceedings before a Court having jurisdiction, regular, down to the time jeopardy attaches, no second jeopardy can be allowed in favor of the state on account of any lapse or error at a later stage.

APPEAL from the *Monroe* Circuit Court.

Friday,
December 2.

HANNA, J.—This was an indictment for murder.

The case was before us at the last term of this Court (see 12 Ind. R. 448), where the facts and reasons upon which a reversal of the judgment below were based, are fully set forth.

The record in the case then before us showed that a motion had been made to discharge the defendant from custody. But at the time the motion was made, the Circuit Court was, as we then decided, attempting to hold an unauthorized sitting. The jury had been kept in custody beyond the regular term of the Court. The verdict was received and the judgment entered on the *Monday* after the term expired, although the record showed that the verdict was agreed upon during the term, but was not returned into Court because of the absence of the judge. It was held that the record failed to show any legal reason for such absence, or for the prolongation of the term beyond the regular time fixed by law. The consequence was, that the proceedings had, after the expiration of that time, were held to be void; and consequently that we could not consider a motion which was then made to discharge him, further than to show the position the prisoner occupied in reference to the proceedings then had. The case was, therefore, remanded for further proceedings. The defend-

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THE STATE.

ant, at the first term of the Circuit Court thereafter, moved that he be discharged from custody. The motion was overruled.

This ruling is now assigned for error.

The constitution provides that "No person shall be put in jeopardy twice for the same offense." Art. i., § 14.

When a valid indictment has been returned by a competent grand jury to a Court having jurisdiction; the defendant has been arraigned and pleaded; a jury been impaneled, sworn, and charged with the case; and all the preliminary things of record are ready for the trial; the jeopardy contemplated by the constitution has then attached, and the defendant is entitled to a verdict. 1 Bish. Crim. Law, 660.—Whart. Crim. Law, 574.—*Wright v. The State*, 5 Ind. R. 290, 527.—7 *id.* 324. The defendant may, by his consent, or various acts from which such consent will be presumed, waive this constitutional right. 1 Bish. Crim. Law, 657.—6 Cush. 560.—37 Maine R. 156.—Whart. Crim. Law, 591. Or unforeseen occurrences may intervene, which will operate to withdraw from the prisoner the benefit of this privilege. Whart. Crim. Law, 588.—1 Bish. Crim. Law, 667.—2 Mo. R. 166.—9 Leigh. 613.—3 Rawle, 498.—4 Halst. 256.—2 Grat. 567.—7 *id.* 662.—6 S. and R. 577.—10 Yerg. 532.

But when the indictment is valid, and the proceedings are regular, before a tribunal having jurisdiction, down to the time the jeopardy attaches, there can be no second jeopardy allowed in favor of the state, on account of any lapse or error at a later stage. 1 Bish. Crim. Law, 665.—*Wright v. The State*, 7 Ind. R. 324.—4 Blackf. 345.—8 *id.* 526.—1 Eng. 169, 259.—Mart. and Yerg. 137.

At the last term we decided there had been a lapse—an error of the Circuit Court. The record does not show that the defendant, in any manner, waived his rights. He was once in jeopardy, and in consequence thereof, and of that error, he is protected by the constitution from being again placed in jeopardy for the same offense. The Circuit Court should have discharged him.

Per Curiam.—The judgment is reversed with directions to the Circuit Court to sustain the motion and discharge the defendant from custody.

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1859.

MILLER
v.
MACKLOT.

J. Hughes and *D. W. Voorhees*, for the appellant.

J. E. McDonald and *I. N. Pierce*, for the state.

MILLER and Wife v. MACKLOT and Another.

By our practice, a warrant of attorney to confess a judgment is entered upon the record immediately preceding the judgment, and in effect becomes a part of it. Hence, where the warrant contained a release of errors and a waiver of the right of appeal, it was *held*, that the defendant could not appeal in violation of its terms.

APPEAL from the *St. Joseph* Circuit Court.

Friday,
December 2.

HANNA, J.—A complaint, in the usual form, together with a promissory note, two mortgages, and a warrant of attorney to confess a judgment, were filed, and an appearance entered, by the attorney thus authorized, for the defendants, and a judgment confessed by him, and a foreclosure of the mortgages, &c.

Seven errors are assigned, to which several assignments there is an answer, averring that said appellants are estopped by a release of errors contained in said warrant of attorney, from all right of appeal.

To this answer a demurrer is filed, which presents the first question for our decision.

The language used in the instrument is, "and we hereby release all errors, and waive all right of appeal."

The attorney who appeared for said defendants and confessed the judgment, did not, so far as the record discloses, release errors or waive the right of appeal, unless the above-quoted clause in the warrant of attorney, and the general confession of judgment thereon, had that effect.

Our statute upon the subject of confessing judgments has reference peculiarly to such a proceeding where no ac-

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tion is pending. The 384th section is, that "The debt or cause of action shall be briefly stated in a writing, to be filed and copied into the judgment. The confession shall operate as a release of errors."

It is evident that the phraseology here used has application more immediately to confessions made in person by the judgment-defendant. It was so held in *McPheeters v. Campbell*, 5 Ind. R. 108, and that an attorney had no power to waive errors and the right to an appeal, unless authorized to do so by the power under which he acted, and that this statute did not render binding the act of an attorney in waiving errors where he was not so authorized. But that case does not decide the question here raised, as the appellant supposes.

Attorneys, in this instance, as in many others, have rested satisfied that their duty to their clients was fully discharged when they had given their opinion of what the law ought to be, without taking upon themselves the trouble of finding out, from the authorities, what it really is. This mode of practice, whilst it is exceedingly convenient to attorneys who may be pressed with business, is equally as inconvenient to the Court required to give a written opinion, and often results in a delay of the attorney's business at the expense of his client.

In *Cave v. Massey*, 3 B. and C. 735 (10 Eng. C. L. 218), it was held by the Court of King's Bench, that where a defendant obtained time to plead in *Michaelmas* term, on the terms of giving judgment of that term, it must mean an available judgment. "If the writ of error had been brought then, it would have been returnable last term. By this breach of engagement, unless we quash the writ of error, the defendant would gain a term." The writ was set aside.

So in *Cates v. West*, in the same Court, 2 Durnf. and East, 183: "The defendant's attorney had undertaken that the debt should be paid if the plaintiff's attorney would give time, which the latter had agreed to do, provided no delay was intended on the other side. But after this agreement, the defendant had brought a writ of error.

The Court discharged the rule, considering the writ of error as sued out against good faith."

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1859.

In *Baddely v. Shafto*, 8 Taunt. 434, "the defendant had given the plaintiff a warrant of attorney, &c., with a release of errors, in the common printed form. Default having been made, and the time for entering up judgment having expired, the plaintiff sued out a writ of *scire facias* to revive the judgment, to which the defendant pleaded. The cause was tried, and the plaintiff had judgment; upon which the defendant brought a writ of error." A rule had been obtained to have the writ of error set aside. The rule was made absolute.

MILLER
v.
MACKLOT.

These decisions appear to rest upon the principle, that it would be a species of bad faith, which ought not to be countenanced, for a party, in violation of an agreement not to do so, to resort to a writ of error.

Under our statute and practice, the warrant of attorney is copied, or entered upon the record, immediately preceding, and, in effect, becomes a part of, the judgment. We are of opinion, therefore, that it is so far an agreement, upon the part of the defendant, as to preclude him, at least whilst the acts of the attorney have been within his power, from his appeal, in violation of its stipulations releasing such right. The plaintiff, by taking his judgment in that form, accepts the agreement.

In the case at bar, there are none of the errors assigned, except the seventh, that the estoppel cannot be pleaded to. The seventh is, "that the Court rendered judgment for an amount greater than authorized by said power of attorney."

The answer is sufficient to all the assignments of error, except the seventh, to which it does not apply. The demurrer is, therefore, overruled.

As to the seventh assignment, the judgment is for the amount of the note and interest, which is some 7 dollars more than the sum mentioned in the power of attorney, as being the amount for which the attorney was authorized to confess judgment; but afterwards that amount ap-

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1859.

McCord
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appears to have been remitted by an entry of record. We see no error in this.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. F. Miller, for the appellants.

E. Egbert and *J. A. Liston*, for the appellees.

McCord v. THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

Suit by a railroad company upon a subscription of stock. Answer, 1. A denial of the subscription. 2. That the capital stock of the company was fixed by the act of incorporation at 5,000,000 dollars, in shares of 50 dollars each, and that they had no power to issue certificates for a larger sum, except as in the act of incorporation provided as follows: "Provided, that if the capital stock of said company any time subscribed shall be insufficient for the purposes aforesaid, of this act, it shall and may be lawful for the president and directors of said company, from time to time, to increase the said stock, by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company." That before the commencement of the suit, the company had issued stock to the amount of 5,000,000 dollars, in shares, &c., and that said amount, &c., was sufficient, &c.; that the president, &c., have not, at any time before the commencement of the suit, increased the capital stock, &c., beyond that amount, nor was the same necessary, &c. 3. That the capital stock was limited to 5,000,000 dollars, and no more, except, &c.; that the plaintiffs fraudulently issued stock to an amount exceeding 5,000,000 dollars, the same not being then and there necessary, &c., and then and thereby rendered the original subscription to the capital stock of the company of no value, and reduced the market price of the stock, &c.; wherefore, &c. Reply, to the second paragraph, that after the issue of the stock in said paragraph mentioned, to the amount of 5,000,000 dollars, the plaintiffs ordered and directed, as by the said charter was authorized, a further issue, &c., to the amount of 1,500,000 dollars, of which, 500,000 dollars has been issued, and that the issue of the further sum of 1,000,000 dollars is authorized; and that the issue of said additional stock was necessary, &c.

Held, 1. That the third paragraph of the answer was bad on demurrer.

2. That the issue formed upon the second paragraph of the answer was material; and that it devolved upon the plaintiffs to prove that the stock had been increased as alleged in their reply.

APPEAL from the *Knox* Circuit Court.

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WORDEN, J.—Suit by the company against the appellant on a stock subscription.

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The complaint alleges the making of the subscription, setting out a copy, and also the making by the company of the proper calls, and notice thereof to the subscribers.

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An answer of three paragraphs was filed, viz.:

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1. A denial of the subscription as set forth.

2. That the capital stock of the plaintiffs was fixed by their act of incorporation at 5,000,000 dollars, in shares of 50 dollars each, and that the plaintiffs had no power to issue certificates of stock for a larger sum than 5,000,000 dollars, except as in the act of incorporation is provided, as follows: "Provided, that if the capital stock of said company any time subscribed shall be insufficient for the purposes aforesaid of this act, it shall and may be lawful for the president and directors of said company, from time to time, to increase the said stock by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company;" that before the commencement of the suit, the plaintiffs had issued stock to the amount of 5,000,000 dollars, in shares of 50 dollars each, and that said amount of capital stock was sufficient for the purposes contemplated by said act of incorporation; that the president and directors of the company have not, at any time before the commencement of the suit, increased the capital stock of the plaintiffs beyond the amount of 5,000,000 dollars, nor was the same necessary, &c.

3. That the capital stock of the plaintiffs was, by their act of incorporation, limited to 5,000,000 dollars, and no more, except as in the second paragraph is stated; that the plaintiffs fraudulently issued stock to an amount exceeding 5,000,000 dollars, the same not being then and there necessary to carry out the objects of said act of incorporation, and then and thereby rendered the original subscription to the capital stock of the company of no

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value, and reduced the market price of the stock from its par value to five dollars per share thereof; wherefore, &c.

To the second paragraph, the plaintiffs replied, "that after the issue of the stock in said paragraph mentioned, to the amount of 5,000,000 dollars, the plaintiffs ordered and directed, as by the said charter was authorized, a further issue of additional stock to the amount of 1,500,000 dollars, and that of said additional stock only 500,000 dollars has been issued, and that the issue of the further sum of 1,000,000 dollars is authorized, and that the issue of said additional stock was necessary and authorized by said charter."

A demurrer was sustained to the third paragraph of the answer, to which exception was taken.

Trial by jury; verdict and judgment for the plaintiffs, a motion for a new trial being overruled.

Three points are relied upon to reverse the judgment—

1. The overruling of the demurrer.
2. Erroneous instruction to the jury.
3. The refusal of the Court to grant a new trial.

We are of opinion that the demurrer was properly sustained to the third paragraph of the answer. It was evidently the province of the president and directors of the company to judge of the necessity of issuing the additional stock; and although they may have judged incorrectly as to the necessity of issuing this stock, their act, in so doing, is not necessarily fraudulent. Fraud is charged in the paragraph in general terms, but that is insufficient. The particular acts and circumstances of fraud should have been set out. *Webster v. Parker*, 7 Ind. R. 185.—*Keller v. Johnson*, 11 *id.* 337. It is unnecessary to inquire whether the paragraph is otherwise sufficient.

Objection was made to the admissibility, and to the sufficiency of certain evidence offered and received in support of the allegations concerning the calls and notice. As these allegations were not denied by the answer, they must be taken as true, and therefore it is immaterial whether the evidence was admissible, or whether it would have been sufficient had the allegations been denied.

On the trial, there was no evidence offered that the president and directors of the company had increased their capital stock beyond the 5,000,000 dollars provided for in the charter, as was alleged in the replication to the second paragraph of the answer.

The Court gave the jury the following charge, to which the defendant excepted, viz.:

"It is immaterial for the jury to inquire as to whether the capital stock of the company was increased or not."

It is claimed by the counsel for the appellees that the issue formed upon the second paragraph of the answer, was wholly immaterial, and, therefore, that the charge was correct. We do not, however, coincide in this view of the pleading. If, as alleged in the answer, the company had already issued stock to the full amount of 5,000,000 dollars, provided for in the charter, they had none left to vest in the defendant upon his payment of the subscription, unless the amount of the stock had been increased by the president and directors of the company. Without such increase, certificates of stock issued by the officers of the company would be unauthorized and void. Pierce on Railroad Law, 130, *et seq.* Now, we take it to be clear, that, although the tender of a certificate of stock to a subscriber is not necessary before suit on the subscription, yet no recovery can be had unless the company is in a condition that the subscriber for stock, upon the payment of his subscription, may receive his stock and become entitled to the rights of a stockholder. How can that be the case, where the entire amount of the stock authorized by the charter has been taken and issued to other subscribers? Suppose, in the present case, the charter of the company had absolutely limited the stock to the amount of 5,000,000 dollars, instead of permitting the president and directors to increase it. It would probably not be contended that after the whole amount had been taken and issued, a person having subscribed, but not having paid or received any stock, could be compelled to pay his subscription. He could not be compelled to pay unless the company could furnish him with that for which he subscribed, which, in

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the case supposed, they could not do, for the reason that the entire authorized capital stock has been taken and issued to more prompt subscribers. If the company has not increased their stock, through the action of their president and directors, they stand, so far as the appellant is concerned, as if their stock were absolutely limited to the 5,000,000 dollars already issued. The appellant should not be compelled to pay his subscription, trusting to the president and directors of the company to increase the stock that he may have the benefit of it. The president and directors might not see proper to make the increase, and indeed such increase might not be deemed necessary for carrying out the purposes of the charter. The whole amount of the capital stock provided for by the charter, having been taken up and issued, we think an increase of the stock as provided for in the charter, a condition precedent to the right of collecting further subscriptions. If the capital stock has been increased, as alleged in the replication, it devolved upon the company to make proof of the fact.

The issue, in our opinion, was not immaterial, and the charge of the Court was wrong.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. M' Donald and *A. G. Porter*, for the appellant.

S. Judah, for the appellees.

SMITH and Others v. JOHNSON.*

Friday,
December 2.

APPEAL from the *Vigo* Circuit Court.

Per Curiam.—We think the judgment in this case must be reversed, and the cause remanded for a further trial, for

* This case was first decided May 27, 1857. A petition for a rehearing, filed on the 15th of June, of that year, was granted.

error in the Court below in refusing instructions to the jury. We think there was some evidence to which the instruction refused might have been applicable; and the case is not so clear on the evidence as to authorize us to decide the case upon [it], regardless of the error of the Court above stated.

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The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher, for the appellants.

S. B. Gookins, for the appellee.

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At common law, the husband, at marriage, became entitled to the wife's personal property as absolutely as if he had purchased it from a third person; but the rule has been abrogated in this state by 1 R. S. p. 321, § 5, and Acts 1853, p. 57, § 5.

The latter enactment is not unconstitutional.

By these statutes, the wife cannot convey her personal property without the consent of her husband; but otherwise she is as fully entitled to the use, possession, and control of her separate personal property as if she were unmarried; and this right exists as against the husband, as well as against the world at large.

The wife may sue her husband in respect of such separate property.

APPEAL from the *Orange* Court of Common Pleas.

Friday,
December 2.

WORDEN, J.—Complaint by *Nancy* against *Charles*, alleging, in substance, that on the 31st of *December*, 1856, she intermarried with the defendant; that at the time of the marriage she was possessed, in her own right, of certain articles of personal property, describing them, such as cattle, horses, hogs, chickens, farming implements, household furniture, &c., and that she took the property with her to use as her own; that afterwards, the defendant fraudulently took and converted the property to his own use, and deprived the plaintiff of the use and enjoyment thereof; that the defendant cruelly mistreated and abused her, so that

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she could no longer live with him, and was compelled to leave him; that he fraudulently refused to permit her to take away her property, but unlawfully detains the same from her; wherefore, &c.

On motion of defendant, that portion of the complaint was ordered to be stricken out "which refers to the ill treatment of the plaintiff."

The defendant demurred to the complaint, assigning for cause, that the plaintiff had not the legal capacity to sue the defendant, and that the complaint did not state facts sufficient, &c. The demurrer was overruled, and the defendant excepted.

Thereupon, an answer was filed denying the allegations of the complaint, except the marriage.

Trial by jury; verdict for the plaintiff for 251 dollars, 50 cents. Motion for a new trial overruled, and judgment.

The errors assigned are—

1. That the Court erred in overruling the demurrer to the complaint.

2. The verdict is defective in not responding to the issues joined; and,

3. The Court erred in overruling a motion for a new trial.

The first question presented, relates to the sufficiency of the complaint. Before examining the point as to the legal capacity of a wife to sue her husband, we will inquire into her rights respecting the property involved.

At common law, the husband, upon marriage, became entitled to the wife's personal property, as absolutely as if he had purchased it from a third person.

But this rule of the common law has, in this state, been abrogated by legislative enactments. By § 5, 1 R. S. p. 321, it is enacted that "No lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried; provided, that such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join."

By § 5, Acts 1853, p. 57, it is enacted that "The personal

property of the wife, held by her at the time of her marriage, or acquired during coverture, by descent, devise, or gift, shall remain her own property to the same extent, and under the same rules, as her real estate so remains."

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We may remark, in passing, that an objection is made to the constitutionality of the latter enactment, on the ground that the title to the act is insufficient. This statute was held to be constitutional in *Wilkins v. Miller*, 9 Ind. R. 100. It was so recognized in *Reese v. Cochran*, 10 Ind. R. 195, and a number of other cases since decided. Whatever doubt there may have been as to the validity of this enactment, it has been too often acted upon as valid, to permit a reëxamination of the question.

By the latter statute, the personal property of the wife, held by her at the time of her marriage, &c., shall remain her own property to the same extent, and under the same rules, as her real estate so remains. How is it with her real estate? The statute first above quoted answers, that it "shall be her separate property as fully as if she was unmarried." As she cannot convey her real property without the consent of her husband, and as she holds her personal with the same extent of right as her real estate, she cannot convey her personal, without the consent of her husband. *Reese v. Cochran, supra*. From the foregoing statutory provisions it is apparent that the wife is fully entitled to the use, possession, and control of such personal property as is mentioned in the statute, as fully as if she were unmarried, and this right exists not only as against the world at large, but equally as against her husband. If the husband, or the husband and wife jointly, were entitled to the possession and control of the property, how could the wife's right exist as fully as if she were unmarried? The statute makes such property her own, separate property. In respect to such property, she is entirely independent of her husband, and may possess, enjoy, control, and, in short, do anything with it which she pleases, except to dispose of it without her husband's consent. This is a decided innovation upon the principles of the common law, but we see no other construction that can be properly put upon the

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statutes in question. This construction is sustained by authority.

In *Darby v. Callaghan*, 16 N. Y. Court of Ap. 71, it was held, under statutes not unlike our own, that a married woman, being entitled to a leasehold estate, might bring an action in her own name to recover it. The Court say (p. 76): "The statute has changed the law, * * * and made all property held by a married woman at the time of her marriage, or acquired by her subsequently, hers absolutely, and has enabled her to use, control, enjoy, and dispose of it, independently of her husband, and as her separate property."

The rights of a married woman to property, under the statute, are very analogous, if not precisely the same as her rights formerly in equity, to property which she may have received by gift, devise, or marriage settlement, to be held "to her separate use." A Court of equity would always protect her in the enjoyment of such property as against the husband as well as others.

Thus, in *Bennett v. Davis*, 2 P. Will. 316, a wife having lands devised to her for her separate use in fee, and her husband becoming bankrupt, the lands were assigned by the commissioners of bankruptcy to one *Davis*, in trust for the creditors. The husband and *Davis* were decreed to convey to a trustee for the use of the wife.

A more modern case is that of *Anderson v. Anderson*, 2 M. and K. 427. There, a testator bequeathed leasehold property to his daughter for her own and sole use, free of control of any present husband or any husband to come. The daughter was unmarried at the date of the will, and at the death of the testator. She married without a settlement, and having shortly afterwards separated from her husband, she filed a bill against him, claiming to be entitled to the leasehold property bequeathed to her separate use. *Held*, that she was so entitled; and a conveyance to the plaintiff, to her sole and separate use, was directed accordingly.

In *Vizonneau v. Pegram*, 2 Leigh, 183, it was held, that a *feme covert*, *quoad* property settled to her separate use,

is a *feme sole*, and has a right to dispose of all her separate personal estate, and the profits of her separate real, in the same manner as if she were a *feme sole*, unless the power of alienation be restrained by the instrument creating their separate estate. The fact that the statutes do not permit an alienation, by a *feme covert*, of her property without the consent of her husband, does not in the least interfere with her right to the possession, use, and control of it. In many instances she had not the power formerly to alienate property held by her for her separate use.

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Thus, in *Tullett v. Armstrong*, 1 Beav. 1, it was held that if a gift be made to a woman for her sole and separate use, without more, she has, during coverture, an alienable estate, independent of her husband. If the gift be made to her separate use, without power to alienate, she has, during coverture, the present enjoyment of an unalienable estate.

Afterwards, in *Bogget v. Meux*, 1 Phil. 627, it was said by the chancellor, that "After the case of *Tullett v. Armstrong*, there can be no doubt about the doctrine of this Court respecting the property given to the separate use of a married woman. * * * The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture, from alienation."

Many other cases might be cited, were it necessary, to show that before the passage of the statutes in question, a married woman might hold property to her separate use, independently, and beyond the control of her husband, without the power of alienation. The statutes seem to adopt this equitable doctrine in respect to all her property both real and personal, held by her at the time of her marriage, or acquired during coverture, in the manner specified in the statute, leaving it hers in all respects as fully as if she had remained unmarried, requiring only the assent of the husband to an alienation.

Regarding the plaintiff as being entitled to the property in question as fully as if she were unmarried, as against

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her husband, as well as against all other persons, it remains to inquire whether she can sue him with respect to the property.

Section 8 of the code, provides that "When a married woman is a party, her husband must be joined with her; except,

"*First.* When the action concerns her separate property, she may sue alone.

"*Second.* When the action is between herself and husband, she may sue or be sued alone," &c.

This section seems fully to warrant the suit. This was virtually determined in the case of *Wilkins v. Miller, supra*.

It is suggested that this section should be construed to authorize her to sue her husband for divorce and alimony only. We cannot, however, agree to this construction, as it is evident that the legislature intended to permit her to sue her husband or any one else, in respect to her separate property. After the passage of the code, the legislature provided, in effect, that her personal property should be her separate property, and it follows that she may sue her husband or any one else, in respect to it. It is no new thing that a wife may sue her husband in respect to her separate property. *Anderson v. Anderson, supra*. As long ago as the time of Lord MACCLESFIELD, it was said by him, in a case concerning a bond given by the wife to the husband before their marriage, "it is unreasonable that the inter-marriage upon which alone the bond is to take effect, should, itself, be a destruction of the bond, and the foundation of that notion is, that in law, the husband and wife being one person, the husband cannot sue the wife on this agreement, whereas in equity it is constant experience that the husband may sue the wife, or the wife the husband, and the husband might sue the wife on this very agreement in the principal case." *Cannel v. Buckle*, 2 P. Will. 243.

Whether these provisions of the statute are wise and salutary, and calculated to promote the harmony of domestic life, preserve the sacredness of the marriage relation, and promote the real interests of those for whose benefit they were intended, are questions not for the determina-

tion of the Courts. If experience shall prove them to be unwise and impolitic, the body only that enacted, can repeal or modify them.

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The demurrer to the complaint was correctly overruled.

The second error assigned, in relation to the insufficiency of the verdict, is based upon the supposition that there were two paragraphs in the complaint. Such is not the case. There was a complaint filed originally, and afterwards an amended complaint was filed, containing the facts in substance as hereinbefore stated. This amended complaint took the place of the original, and was the one upon which issue was joined and the verdict rendered. The verdict seems to be, in all respects, sufficient.

The motion for a new trial was predicated, amongst other things, upon supposed erroneous instructions to the jury. No objection has been pointed out except upon the general question as to the right of the plaintiff to the property, and we think the instructions in this respect right.

It is also objected that there was no proof of a conversion of the property by the defendant. There was proof that the plaintiff had separated from the defendant, and evidence from which the jury might have inferred that he refused to permit her to take her property. We cannot disturb the finding of the jury on the evidence. The plaintiff being entitled to the property, if the defendant refused to permit her to take it away, it follows that she could recover it, or its value. It is the unanimous opinion of the Court, that the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

J. Collins, J. Cox, and J. Payne, for the appellant.

C. L. Dunham and H. Heffren, for the appellees.

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STANLEY and Another v. PEEPLES and Others.

STANLEY

v.

PEEPLES.

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A demurrer to a complaint for a new trial, stating that the complaint "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action," though not strictly formal, is substantially sufficient.

An application for a new trial may be made by complaint, where the cause for the application is discovered after the term at which the decision was rendered; but the cause thus discovered must have had an existence at the time of the decision.

To entitle a party to a new trial after the term, he must show sufficient matter to have entitled him to a new trial if applied for in term.

Error in the judgment upon the original complaint, is not a sufficient cause for a new trial after term. It is too general; it does not show wherein the errors consisted, nor that they were unknown to the party during term.

Friday,
December 2.

APPEAL from the *Marshall* Circuit Court.

DAVISON, J.—In *February*, 1853, *Hugh Peeples*, and his children, *Susannah*, *William*, *Samuel*, *George*, *Daniel*, and *John*, brought this action against the appellants, who were the defendants, to set aside the sale of a tract of land in *Marshall* county. The case made by the pleadings is as follows:

Patsey Peeples, the wife of *Hugh Peeples*, and mother of the above-named children, owned the land in contest. In *March*, 1850, *Hugh* started for *California*, intending to be absent two years; but he returned in one year and ten months. Soon after he started, *Patsey*, his wife, died, leaving the said children her heirs at law; and about three months thereafter, viz., in *June*, 1850, *Ira Stanley*, one of the defendants below, and one of the appellants, instituted a suit in chancery in the *Marshall* Circuit Court against *Hugh Peeples* and his children, which resulted in a recovery against him for 596 dollars, and a decree that for the payment thereof, the land in question be sold, &c. Upon that decree an order of sale was issued, by virtue of which the land was offered for sale, and *Stanley* purchased it for 400 dollars, entered a credit upon the decree for the purchase-money, and received a deed pursuant to the sale. After this, *Stanley* sold and conveyed the same land to one *William Curtis*, who took possession, &c. The plain-

tiffs aver that the proceedings which resulted in the above decree were fraudulent and void; that *Hugh Peebles* had no notice of the suit in which it was rendered; that the children were infants and no guardian was appointed, &c.; and that *Curtis*, when he purchased, had full notice, &c. And, further, it is averred that he, *Curtis*, bought the land for 500 dollars, but had not, at the commencement of the suit, paid the purchase-money. The relief prayed is, that the decree in chancery, and the sale under it, be vacated, &c., and that the plaintiffs' title be quieted, &c.

The issues were submitted to the Court, and final judgment rendered for the defendants.

Within one year after the rendition of this judgment, the plaintiffs filed a complaint for a new trial, wherein, after reciting substantially the above proceedings, they allege that the defense set up to their action was founded alone on said decree in chancery referred to in their complaint; that that decree, since the rendition of said judgment, was, by the Supreme Court, at its *May* term, 1855, reversed and set aside, and, should a new trial be granted to them, they would be able to sustain their original complaint against said defendants, and that they, the defendants, could make no defense. The plaintiffs further say, that the judgment of the Circuit Court was and is erroneous in law; wherefore they pray that it be set aside and a new trial granted, &c.

To this complaint for a new trial, the defendants demurred, and for cause of demurrer alleged that the same "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action;" but their demurrer was overruled.

Answers were then filed, which, on demurrer, were adjudged insufficient, and there was judgment in favor of the plaintiffs, granting them a new trial, &c.

Thereupon the plaintiffs filed a supplemental complaint, setting up the reversal of the decree in chancery by the Supreme Court, to which supplemental complaint there was a demurrer overruled, when the plaintiffs withdrew their replies to defendants' answers to the original com-

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plaint, and demurred to said answers, which demurrer was sustained, and final judgment, setting aside the sale of the land, &c., rendered, &c.

The error mainly relied on for the reversal of this judgment, relates to the action of the Court in overruling the demurrer to the complaint for a new trial. It is insisted, however, that that demurrer is defective in point of form, and for that reason could not be sustained. It says the complaint "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action." This is not, it is true, in the precise form pointed out in the act relative to pleadings, &c., nor is it essential that it should be. Section 50 of that act points out six causes of demurrer, and if either be substantially averred, the demurrer itself will be held unobjectionable. 2 R. S. p. 38.—*Lagow v. Neilson*, 10 Ind. R. 183.—*The State v. Leach*, *id.* 308. In this instance, the fifth statutory cause of demurrer, namely, "that the complaint does not state facts sufficient to constitute a cause of action," is, in our opinion, sufficiently alleged.

As we have seen, the complaint in question presents two causes for a new trial—

1. The reversal of the decree in chancery by the Supreme Court.

2. Error in the judgment in favor of the defendants upon the original complaint.

The code enumerates eight cases, in either of which a new trial may be granted, and provides, as a general rule, that "the application for a new trial must be made at the term the verdict or decision is rendered." There is, however, another provision which authorizes the party, where the causes for a new trial are discovered after the term, and within one year after final judgment, to make such application by filing his complaint, &c. 2 R. S. pp. 117, 119, §§ 352, 354, 356. Here, the application was made after the term at which the decision was rendered; and the only question to settle is, were the alleged causes sufficient to authorize the new trial? If they were not, then the proceedings subsequent to the demurrer are erroneous.

The first alleged cause, namely, the reversal of the decree in chancery, did not exist at the time of the trial and judgment upon the original complaint. Hence, it is insisted that upon that cause a new trial could not be properly granted. This position seems to be correct. An application for a new trial, under the statute, may, it is true, be made, where the cause for such application is discovered after the term at which the decision was rendered; still the cause thus discovered must have had an existence at the time of the decision. To entitle a party to a new trial after the term, he must show sufficient matter to have entitled him to a new trial if applied for in the term. Nor does it appear that, in this instance, a new trial was at all necessary to the protection of the plaintiffs' rights or the furtherance of justice; because the decree in chancery being reversed, the judgment upon their complaint was a nullity, and it was competent for them to prosecute a new action for restitution of the land.

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The second ground upon which a new trial is sought, is also insufficient; because it is not sufficiently specific. It does not show wherein the errors in the judgment consisted; and, moreover, we must presume that such errors, if any exist, were known to the plaintiffs during the term at which the decision was rendered.

The judgment granting a new trial must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Reeve, for the appellants.

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147	497
13	235
155	183

THE BOARD OF COMMISSIONERS OF JASPER COUNTY v.
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The legislature may delegate the power to organize new counties. The act of *March*, 1857, upon this subject, is not in conflict with any provision of the constitution. No legislative power is delegated by that act.

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A single county containing the requisite area, may be divided under the act, by its own board of commissioners, acting through a single committee of freeholders.

The Courts will take notice judicially of the area of an established county.

For the causes for which a writ of prohibition may be allowed, the Courts must look to the common law.

Under our system of procedure, the writ can only be used "to command the judge and parties of a suit in an inferior Court, to cease the prosecution thereof, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court."

Thus the writ will not be granted to prevent a county board from entering an order for the establishment of a new county, under the act of *May*, 1857. An appeal is the proper remedy.

Friday,
December 2.

APPEAL from the *Jasper* Circuit Court.

DAVISON, J.—The case made by the pleadings is as follows:

Under an act entitled "An act to authorize the formation of new counties," &c., approved *March* 7, 1857, certain citizens of *Jasper* county, residing within a certain district in the county, presented to the board of commissioners of said county a petition wherein they set forth the boundaries of the district in which they reside, and allege that such district ought to be formed into a new county, to be called the county of *Newton*; that the area embraced within the boundaries, was, as near a square as may be, and would, if formed into a new county, leave four hundred square miles in the old county of *Jasper*, &c.

The commissioners, at their *December* term, 1857, proceeded to act upon the petition, and, upon final hearing, &c., appointed a committee of three freeholders, residents of said district, to lay off and establish the boundaries of the proposed new county. And the committee thus appointed having made their report, the same was, by order of the commissioners, duly filed, &c.

After the filing of the report, and before the commissioners had further acted in the matter, *Spitler*, the appellee, who was the plaintiff below, filed his complaint in the *Jasper* Circuit Court, reciting, substantially, the above proceedings, and alleging that the act of *March*, 1857, does not authorize the division of a single county by the act of

a single board of commissioners, acting through a single committee of freeholders; and further, that said act of 1857 is in conflict with the constitution. He, plaintiff, in his complaint, suggests that unless prohibited by an order of the Court, the commissioners may, at their next term, enter an order establishing the boundaries of the proposed new county, and certify their proceedings to the secretary of state, &c. He therefore prays that a writ of prohibition may issue, directed to said commissioners, commanding them not to enter upon their order book an order establishing such boundaries, &c.

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The defendants demurred to the complaint; but their demurrer was overruled, and an order granted as prayed for, &c.

The act to which these proceedings refer, provides "That whenever a majority of the legal voters to be affected thereby, in any district embracing an area of not less than four hundred square miles, shall desire the formation of a new county, and, by written request, petition the board of commissioners of the several counties to be affected by the formation of said new county, * * * the said boards shall appoint each a committee of three resident freeholders, in each county of the district embraced in such change, who shall form a board of commissioners to lay off and establish the boundaries of the proposed county, * * * and shall report the same to such boards of commissioners of the several counties affected by the formation of said new county, at the next or some subsequent session; and upon said report being made, the boards of commissioners of said several counties aforesaid, shall enter upon their order books, respectively, an order establishing the boundaries of said new county, which shall be by them filed in the office of the secretary of state. Acts of 1857, pp. 25, 26, § 1.

Does this act conflict with the constitution?

It is insisted that the power to organize new counties, has ever been exercised by direct legislation, and cannot be delegated. The position thus assumed is not, in our opinion, well taken. The act of *March*, 1857, is a general law

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of uniform operation, to be executed through the agency of the board of commissioners. And it seems to us, that the power thus conferred, so far as it relates to their duties under the act, is purely ministerial and not legislative. Indeed, the constitution itself declares that "The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character." Art. vi., § 10. Under this provision, the legislature seems to be plainly authorized to confer the power embraced in the act before us. In cases like the present, the taking effect of the law is not the result of any action on the part of the commissioners; nor do they decide whether the act is or is not in force, but simply whether it applies to the case made by the petition, which the act prescribes. This is evidently not the exercise of delegated legislative power; but merely the application of the provisions of a general law to a given case, local in its character.

But it is argued that "the county boundary of *Jasper* county is fixed by law (1 R. S. p. 168, § 39), and art. iv., § 21, of the constitution, having provided that 'No act shall be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length,' no general law can be made applicable; and § 39, defining the boundary of said county, can only be amended by an act local in its nature—the subject-matter being local."

The answer to this is, that § 39, defining the boundaries of *Jasper* county, is one provision of an act entitled "An act dividing the state into counties, and defining their boundaries," &c., which is a general law, and that the act in question does not purport to be, nor is it, an amendment of any law; but a general, independent enactment, having for its object the formation of new counties, &c. And this Court having decided that the removal of county seats can be made the subject of a general law, there seems to be no reason why such a law cannot be applied to the case stated in the record. *Thomas v. The Board of Comm'rs, &c.*, 5

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But it is argued that the act, though it be valid, "does not authorize the division of a single county, by the act of a single board of commissioners, acting through a single committee of freeholders." It says: "Whenever a majority of the legal voters," &c., "in the district," &c., "shall desire the formation of a new county, and, by written request, petition the board of commissioners of the several counties to be affected by the formation of such new county," &c., "the said boards shall appoint each a committee of three freeholders in each county of the district embraced in such change, who shall form a board," &c., "to lay off and establish the boundaries of the proposed new county," &c.

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The phraseology thus used, would seem to favor the construction assumed in the complaint; but when the reason and object of the enactment is considered, the intent of the legislature evidently was, that the provisions of the act may be applied to a district existing within the bounds of a single county. Indeed, the words "several" and "each" and "county," and the phrase, "board of commissioners," in the connection in which they are used in the act, plainly allow the construction that a district in an old county may be formed into a new county, provided such district contains an area of four hundred square miles, and that such new county, when so formed, does not reduce the old county below that area. In this instance, we will judicially notice that the old county of *Jasper* contains an area of at least eight hundred square miles, and that, consequently, it may be divided so as to form two counties, each having the required area.

An inquiry is raised as to whether the plaintiff has adopted the proper remedy. The appellants contend that the case stated in the complaint is not one in which a writ of prohibition can be sustained. The statute allows such writ; but fails to point out the causes for which it may be allowed. Hence, for these causes, we must look to the common law. *Blackstone* says: "A prohibition is a writ

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issuing out of the Courts of King's Bench, Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in an inferior Court, commanding them to cease from the prosecution thereof, upon the suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court." This writ, says the same author, may also issue to Courts of special jurisdiction, as ecclesiastical Courts, where, "in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of *England*; as, where they require two witnesses to prove the payment of a legacy, a release of tithes, and the like. For as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those Courts, because incident or accessory to some original question clearly within their jurisdiction, it ought, therefore, where the two laws differ, to be decided, not according to the spiritual, but the temporal law; else the question might be decided different ways, according to the Court in which the suit is pending." 3 Blacks. Comm. 112.—3 Toml. Law Dict. 242, *et seq.*—8 Bac. Abr. (Bouv. ed.) 206.—2 Bouv. Law Dict. 377,—2 Chit. Gen. Pr. 388.

This exposition of the causes for which a writ of prohibition may issue at common law, at once shows that, under our system of procedure, it can only be used for one cause, namely, "to command the judge and parties of a suit in an inferior Court, to cease the prosecution thereof, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court." Perk. Pr. 484. If this position be correct, and we think it is, the writ of prohibition, in this instance, was not the proper remedy, because the board of commissioners of *Jasper* county had, in the case pending before it, original and exclusive jurisdiction. Indeed, we perceive no reason why the party, instead of prosecuting the writ in question, did not adopt the usual remedy of appeal; because such an

appeal is plainly authorized by an express statutory enactment. 1 R. S. p. 229, § 31.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. L. Hathaway, J. E. McDonald, S. A. Huff, Z. Baird, L. Barbour, J. D. Howland, and A. L. Roache, for the board (1).

R. C. Gregory, for the appellee (2).

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(1) Counsel for the appellant submitted the following argument:

We object, first, that the proceeding is irregular. The boards of commissioners perform judicial functions, and from their decisions an appeal lies to the Common Pleas or Circuit Court of the county. 1 R. S. p. 229, § 31. The statute makes ample provision for such appeals, not merely in favor of persons who are parties to the record in the commissioners' Court, but in favor of all persons aggrieved who will make an affidavit, showing explicitly the nature of their interest. And such appeals are allowed, not only from judgments, or acts of a purely judicial character, but from "all decisions of such commissioners." So we find reports of cases in the Supreme Court, where appeals have been prosecuted from decisions of the commissioners, in matters rather of a ministerial than a judicial nature.

In this instance, the petition shows that the proceeding was grounded upon an act of the legislature, conferring an express power on the commissioners, and making them the tribunal of original, exclusive jurisdiction in forming new counties. Of whatever character these functions are held to be, whether ministerial or judicial, their exercise is subject to review on the appeal of any party aggrieved. Under such conditions, can the extraordinary remedy of a prohibition be resorted to? We are very confident it cannot.

The 2 R. S. 1852, art. 43, p. 197, provides for the allowance of the writ of prohibition, without any enumeration of the causes for which it shall be allowed. We are, therefore, remitted to the common law for these causes.

The doctrine is, perhaps, as clearly stated in Chitty's General Practice as elsewhere: "With respect to any controlling jurisdiction over inferior Courts, it was determined by all the judges, that this Court (the Common Pleas), as well as the King's Bench, has jurisdiction, by prohibition, to confine temporal as well as ecclesiastical Courts within their proper jurisdiction; but it is more usual to apply to the Court of King's Bench for that writ in term, or to the chancellor in vacation, if an inferior Court should then press forward in a suit over which it has not proper jurisdiction." 2 Chit. Gen. Pr., p. 388. The same application of this extraordinary mode of legal redress is pointed out by *Blackstone*, book 3, p. 112. This author alludes to another class of cases in which a prohibition will lie; as where, in Courts of special jurisdiction, as the ecclesiastical Courts, in a question not properly spiritual, a rule of evidence different from the common law is enforced; so that, if such a Court should require two witnesses to the fact of the signing of a release, or of payment, it might be restrained by prohibition. "Such a fact is not properly a spiritual question, but only allowed to be decided in these Courts because incident or

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accessory to some original question clearly within their jurisdiction; it ought, therefore, when the two laws differ, to be decided, not according to the spiritual, but the temporal law—else the same question might be determined different ways.”

It may be observed that this is an incongruity, which could only happen where there was no final Court of appeals, in which all these different tribunals could be brought into harmonious action; under our system, and in the case under discussion, the inconvenience thus made the reason for a prohibition, does not apply. It is submitted that no case can be found in which an appellate Court has the power to interfere with the proceedings of the inferior Court, in the trial of a cause, by prohibition, unless where the latter is clearly transcending its jurisdiction. If the ground assumed in this cause is a proper one for allowing a prohibition, parties need not any longer resort to the usual course of appeal, but may set the Supreme and Circuit Courts to work with prohibitions, to test the constitutionality of acts which the other Courts of the state are disposed to obey—and, indeed, to control, in any question, the decisions of inferior tribunals.

The unwarranted employment of the writ of prohibition, is conceded in the brief of the appellee.

It is urged, in objection to the proceedings of the commissioners, that the act of 1857 does not contemplate the organization of a new county out of the territory of a single county, but that the boards of commissioners of at least two coterminous counties must appoint each a committee, who shall lay off and establish the new county out of the territory of the two counties so represented. But nothing in the act warrants this interpretation. It is an unreasonable interpretation in every point of view, and so not to be favored. The object of the law is, to permit the majority of voters, in any district of not less than four hundred square miles, to adopt measures to organize that district into a new county. The only restriction imposed by the law, is one copied from the constitution, forbidding the reduction of a county having an area of four hundred square miles, below that area, and any further reduction of a county having already less than that area. There is no other express restriction in the act. The restriction sought to be imposed is by implication. It is not urged, that the territory which the board of commissioners are asked to form into a new county is of less area than four hundred square miles; nor is it pretended that the separation of this territory from *Jasper* county will reduce that county below the area prescribed by the constitution.

The object of the law has been already alluded to. It is quite plain. It offers to the inhabitants of any district of an area not less than four hundred square miles, the privilege of forming out of that district a new county, providing that thereby no county already organized shall be reduced below the limits fixed by the constitution. The reason of the law is as applicable to the case of such a district when it exists entirely within the bounds of a single county, as where it is distributed over several contiguous counties. The phraseology might have been somewhat more copious than the legislature has employed in this act, but hardly clearer. The use of the phrases “several” and “each,” in connection with the word “county,” and the words “board of commissioners,” whenever they appear in the act, evidences the intent of the legislature. That intent, as expressed in the act, clearly conforms to the reason of the law. In this case the law is literally complied with; each board of

commissioners, of the several counties to be affected, has been petitioned, and has acted in the matter. Smith's Comm., § 472, et seq.

It is further objected, that because the subject-matter embraced in an act for the formation of a new county is of a local character, it is the proper subject of a local act, and a general law is unconstitutional. This objection has been sufficiently refuted by this Court in the case of *Thomas v. The Board of Comm'rs, &c.*, 5 Ind. R. 4. We content ourselves with a reference to it.

It is urged by counsel for the appellee, that the power to organize new counties is an act of legislation, and cannot be delegated. The answer to this objection is, in a good degree, anticipated above; for if a general law is applicable, some provisions must be made for giving effect to the law. If the legislature must intervene for the purpose of forming new counties, in each instance, by direct legislation, it can only be by means of a local act, that had been shown not to be necessary. A general law can be made; and to give such a law effect, intermediate agents must be called in with powers sufficient for the proposed object. This is precisely what the legislature has done in this instance. There certainly is nothing in the argument, that because the legislature has heretofore uniformly changed county boundaries, and formed new counties, that body alone can perfect such change. The legislature has heretofore always changed names of citizens, on their petition, by a direct act for the purpose. Does that fact render unconstitutional the provision of the statute which refers such matters to the Courts of justice? Is such power conferred on the Courts, a delegation of legislative functions? It certainly is not. It is only necessary, however, to refer to analogous cases, to show the fallacy of this objection. It is an act of legislation to establish highways. May not the legislature, by general laws, prescribe the terms upon which county and township boards may fix the courses and termini of roads? It is an act of legislation to fix the place of a county seat, and to re-locate a county seat. May not these powers be properly referred to commissioners? It is an act of legislation to name the place at which a state prison shall be constructed. May not a board be organized with powers to select the place, and determine finally the site for such an object? It is the exercise of one of the highest functions of a legislative body, to levy and assess taxes. May not that power be delegated to municipal bodies, without violation of law? These illustrations might be extended much further. They suffice to show that no principle of the constitution is violated by the enactment of a general law for forming new counties, and referring to a board of commissioners that jurisdiction over the subject which authorizes them to determine when the circumstances exist, that the legislature considered sufficient for the formation of a new county. There is, indeed, no delegation of legislative power whatever. The act is general, of uniform operation, and depends upon no contingency. It goes at once into operation, and the commissioners do not decide whether it is or is not in force in a given case, but merely apply it to the circumstances as they arise; and these circumstances are anticipated by the legislature, and prescribed in the act.

It is further objected by the appellees, that the act of 1857 is so far defective, for the want of suitable provisions prescribing the mode in which the new county shall be organized, as to involve a great public inconvenience. Where a law is ambiguous, and the intent of the legislature obscure, arguments drawn from the inconvenience of its execution will be listened to by the Courts. But

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when the law is free from obscurity, and its provisions are explicit, the inconvenience of applying it is not an argument of much weight. The law in question has no such ambiguity in its provisions. It provides, that after the boundaries are established, "said new county shall be, to all intents and purposes, an organized county, with all the rights and privileges that, under the law, appertain to organized counties." This Court, in the discussion of questions growing out of the various school laws adopted within some years past, have not hesitated to disregard the argument of inconvenience, and to express a decided repugnance to its use in cases where the law is clear.

Under the operation of the act of 1857, the territorial limits of the new county are established. The new county has all the rights and privileges of counties already organized. The various offices necessary to perfect its political organization exist by virtue of this provision of the law, immediately upon the establishment of the boundaries. This Court have decided the point in the cases of *Stocking v. The State*, 7 Ind. R. 327; *Rice v. The State*, *id.* 332; and *Driskill v. The State*, *id.* 338, that an office newly created, while without an incumbent, is vacant, and may be filled by appointment, as offices are filled when the vacancy is occasioned by death, resignation, or otherwise.

In such case the 2 R. S. p. 16, provides that the governor shall fill the vacancy in the Common Pleas by appointment. The 1 R. S. p. 512, empowers that judge to fill the vacant offices of the county commissioners; and they supply, by appointment, the other vacant county offices.

But if these provisions do not afford sufficient facilities for the political organization of the new county, the whole difficulty is obviated by the passage of a general law, in *pari materia*, during the late session of the General Assembly. See Acts of 1859, p. 60. The sections of this act, from three to ten inclusive, make ample provision for the emergency. The act of 1857, if it does not contain sufficient provisions to settle the political existence of the new county, has everything in it necessary to determine the boundaries, and establish the territorial limits by which it shall have a geographical existence. This part of the act is perfect and independent. So much of it has been literally complied with. Then, before any public inconvenience is experienced by reason of the want of officers, the act of 1859 comes in to aid the legislation of 1857, and provides everything that is wanting in the latter. This law of 1859, we think, disembarrasses the case of any difficulty, and completes the formation of the new county by giving it the same political features which are found in counties already organized.

(2) Counsel for the appellee made the following points:

I. Injunction is the proper remedy to restrain the doing of any act under an unconstitutional law. *Greencastle Township, &c. v. Black*, 5 Ind. R. 557.

II. The defining the boundaries of counties has ever been, from the earliest existence of the state, matter regulated by direct legislation. Rev. Laws of 1824, p. 92.—Rev. Laws of 1831, p. 110.—R. S. 1843, p. 68.—1 R. S. p. 168. Whilst seats of justice in new counties have ever been established by indirect means, though commissioners, &c. Rev. Laws of 1824, p. 372.—Rev. Laws of 1831, p. 459.—R. S. 1838, p. 505.—R. S. 1843, p. 348.

III. County boundaries thus being, through the entire history of the state, a subject of direct legislation, this power cannot be delegated. *Maise v. The State*, 4 Ind. R. 348.—Const., art. iv., § 1.

IV. The county boundary of *Jasper* county being fixed by law (1 R. S. p. 16, § 39), and the constitution (art. iv., § 21), providing that "No act shall be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length," no general law can be made applicable, and § 39, defining the boundary of *Jasper* county, can only be amended by an act local in its nature, the subject-matter being local. *Stocking v. The State*, 7 Ind. R. 327.—*Cash v. The Auditor, &c.*, id. 227. It is admitted that, as to seats of justice, the law is otherwise. *Thomas v. The Board of Comm'rs, &c.*, 5 id. 4. But it is submitted that, in the latter case, there are no constitutional barriers to the enactment of a general law. See *Langdon v. Applegate*, id. 327; *Kennon v. Shull*, 9 id. 154.

V. Article i., § 25, of the constitution, provides that "No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution." It is submitted that under this restriction on the power of legislation, § 39, above referred to, could not be amended or altered by any act of the board of commissioners or the people of the district embraced in the new county.

VI. The act of *March 7, 1857* (Acts of 1857, p. 25), makes no provision as to the administration of the laws in the newly organized county. What judicial district would the new county belong to? What senatorial district? What representative district?

VII. Article i., § 26, of the constitution, provides that "The operation of the laws shall never be suspended except by the authority of the General Assembly," and can this high legislative prerogative be delegated to a few discontented inhabitants of some remote portion of some border county, acting by petition on the board of county commissioners, who are not even left to act with discretion, but who must obey the behests of those who wish to be "cut off," without regard to the interests of those peace-loving and law-abiding people who are willing to remain within the pale of civil government.

THE CITY OF NEW ALBANY v. SWEENEY.

Where a person took a contract for the improvement of a street, under the general law for the incorporation of cities, and one of the lots opposite which the street was improved was owned by a non-resident, and the assessment against it being unpaid, it was sold for a sum less than the assessment, it was held, that the contractor could not maintain an action against the city for the deficiency.

APPEAL from the *Floyd* Circuit Court.

PERKINS, J.—*Sweeney* took a contract for improving a portion of a certain street in the city of *New Albany*.

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The improvement was petitioned for, and the contract for it let, under the provisions of the general act for the incorporation of cities in this state. One of the lots opposite to which the street was improved was owned by non-residents. The assessment for the improvement against it was not paid, and regular proceedings were had by which the lot was sold to pay the assessment. It failed to bring the amount of it; and thereupon *Sweeney*, the contractor, sued the city for the deficiency.

He obtained judgment below.

The judgment cannot be upheld. The charter provides that in all contracts of the character of that involved in this suit, the cost thereof shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot, and the city shall be liable to the contractor for so much thereof only as is occupied by streets or alleys crossing the same, or by public grounds of the city bordering thereon, and the owners of the lots bordering on such street or alley, or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in proportion to the length of the line of the lots bordering thereon, and owned by them.

The charter is a public law of which the contractor was bound to take notice. His contract with the city was made with reference to it.

The contractor, before undertaking the improvement, should have examined the property, and inquired as to the persons, constituting his reliance for payment, and, if he found them an unsatisfactory security, he should have declined to enter into the contract.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. H. Stotsenburg, for the city.

T. L. Smith and *T. M. Brown*, for the appellee.

HARLAN, Auditor of *Grant* County, v. CARROLL.

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Every general tax-payer of the county, has such an interest in the appropriations made by the county board, as to entitle him to the benefits of the statute touching appeals, when he brings himself within its requirements.

Where an appeal was taken from an order in favor of the auditor for publishing the delinquent list, it was *held*, that the appeal lay, whether the appellant had paid his taxes or not, if he showed that he was entitled to take it, without reference to the *pro rata* assessment for publishing the list.

APPEAL from the *Grant* Circuit Court.

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HANNA, J.—The appellant filed a claim before the board of commissioners of *Grant* county, for making out and publishing the delinquent list for the year 1856. The board allowed him 553 dollars.

Afterwards, the appellee filed an affidavit stating the above facts, and also that he was the owner of certain lands described, included in said delinquent list, and charged with three dollars tax, and with one dollar for the *pro rata* expense in publishing said list; that he was not a party to the order made by the said board; that he was aggrieved, &c.; and praying an appeal, &c.

Upon the affidavit and bond filed, an appeal was taken. In the Circuit Court, a motion, upon written causes filed, was made to dismiss the appeal. The causes were, first, that the said *Carroll* had no interest in the subject-matter of said cause; second, that he had disposed of his interest in said cause; third, that he was not entitled to the remedy by appeal—that his remedy was by injunction.

Accompanying this was the affidavit of the treasurer of the county, stating that *Carroll* had paid the delinquent taxes, costs, &c., charged against him. The bill of exceptions shows that *Carroll* admitted, on the hearing of the motion, that such was the fact.

The motion to dismiss was overruled.

It is insisted that whether the county commissioners made an allowance to the auditor for too great a sum or not, for making out and publishing the delinquent list, is not a decision from which *Carroll* had the right to appeal.

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The statute (1 R. S. p. 229, § 31), allows appeals from all decisions of the commissioners, by any person aggrieved, and provides that "if such person shall not be a party to the proceeding, such appeal shall not be allowed, unless he shall file in the office of the county auditor his affidavit, setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest."

By § 142, 1 R. S. p. 137, the auditor is required to make out a list of delinquent lands, charging them with the amount of delinquent tax, with interest, and with a penalty of 10 per centum on such taxes, &c. Section 143 prescribes the manner in which he shall cause the same to be published, namely, for four weeks in a newspaper, or in handbill form, if the same can be done cheaper, &c., otherwise by three copies posted up in public places in each township.

The account filed by the auditor against the county, upon which the allowance was made from which this appeal was taken, charges for "publishing delinquent list of 1856, by posting up three several copies in each township, &c., making, in all, forty-six copies, being 553,360 words, at ten cents per one hundred words." The order was that he "be allowed 553 dollars, 36 cents, for delinquent list, as per bill."

The evidence shows that the auditor procured the list to be printed in handbill form, and posted up copies thereof; that the charge of the printer was 250 dollars. The evidence is conflicting as to the value of the printing.

Section 202, 1 R. S. p. 146, provides that "The expense of advertising delinquent lands in public newspapers shall be paid out of the county treasury, and the amount charged to the respective tracts advertised accordingly."

Trial by a jury; verdict for the auditor for 127 dollars, 50 cents; upon which the Court made an order allowing him the said sum, and that *Carroll* pay the costs, &c.

The auditor appeals, and insists, first, that the appeal should have been dismissed, for the causes assigned.

We suppose each general tax-payer of the county has

such an interest in the appropriations made by the authorities, as to be entitled to the benefits of the statute in reference to appeals, when he brings himself within its requirements. Therefore, the motion to dismiss the appeal was properly overruled. Whether *Carroll* had paid his tax or not, could not affect the appeal, because he showed that he was entitled to take it, without reference to the question of the *pro rata* assessment for publishing the delinquent list. *Hamilton v. The State*, 3 Ind. R. 458.

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As neither party has seen proper, in the briefs filed, to point out the statutes upon which they rely, we are left in the dark as to that point.

We have not been able to find any other statute which appears to have a bearing upon the controversy, except the general fee bill (Acts of 1853, p. 66), which provides that the auditor, for all records, copies, and other writings, for each one hundred words (counting three figures as a word) shall be entitled to ten cents. As, according to the appellant's showing, there was about twelve thousand words of record, and it was necessary to make a copy thereof for the printer; and as the job of printing said handbills was, by the witnesses, variously estimated at from 70 dollars to 250 dollars, we do not see how we can disturb the judgment based upon the finding of the jury.

Whether the judgment against *Carroll* for costs is right, we cannot decide, as there are no cross-errors assigned here.

Per Curiam.—The judgment is affirmed with costs.

J. Brownlee, for the appellant.

A. Steele, H. D. Thompson, I. Van Devanter, and J. F. McDowell, for the appellee.

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HENRY and Others v. HENRY and Others.

HENRY

v.

HENRY.

In a proceeding to set aside a will, under the statute of 1852, an appeal lies from the Common Pleas to the Circuit Court.

Section 43 of that act, giving such appeal, is not unconstitutional. The title of the act properly embraces the section, and the provision for an appeal is not special, within the meaning of the constitution.

The provision in question was not repealed by the subsequent act authorizing appeals from the Common Pleas and Circuit Courts.

Saturday,
December 3.

APPEAL from the *Johnson* Circuit Court.

WORDEN, J.—This was a suit by the appellees against the appellants to set aside the will of *Robert Henry*, deceased. The proceeding was instituted in the Court of Common Pleas, under the provisions of § 39 of the act prescribing who may make a will, &c. 2 R. S. p. 308. In accordance with § 43 of the same act, the cause was appealed by the plaintiffs below to the Circuit Court, where the defendants moved to dismiss the appeal, which motion was overruled and exception taken. The cause was tried, and a verdict found for the plaintiffs, to the effect that the paper purporting to be the will of said *Henry* was not his will, and judgment was entered accordingly, a motion by defendants for a new trial being overruled.

The first question presented is as to the correctness of the ruling on the motion to dismiss the appeal.

It is insisted that no appeal lies in such case from the Common Pleas to the Circuit Court. Section 43 of the act above cited expressly gives such appeal, and the succeeding section provides that the cause shall be tried in the same manner as if it had been originally commenced in the Circuit Court.

But it is insisted that these provisions of the law are unconstitutional and void, because the right of appeal is a mere matter of practice, and not embraced in the title to the act. The title of the act is as follows: "An act prescribing who may make a will, the effect thereof, what may be devised, regulating the revocation, admission to probate, and contest thereof." This title we think broad

enough to cover all steps provided for in the act relating to the "contest" of wills, including appeals as well as any other step to be taken in such contest. But it is further objected that this provision in reference to appeals is "special," when a general law could be made applicable. It is true, that a general law could be made by which appeals might be taken in all cases from the Common Pleas to the Circuit Court, but such legislation might not be deemed by the legislature wise or salutary. It does not follow that if the legislature would allow such appeal in one class of cases, they must permit it in all cases. A law authorizing such appeal in a particular class of cases is a general law. It operates upon all cases of the class, and is coëxtensive with the boundaries of the state.

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It is also claimed that the provision in question is repealed by the general law, passed subsequently, authorizing appeals to the Supreme Court from the Common Pleas and Circuit Courts. 2 R. S. p. 158. This position, we think, is not tenable. There is no inconsistency in these statutes. They may both stand and have full effect. The act concerning wills provides that "any party aggrieved by the decision of such Court (Common Pleas) may appeal therefrom to the Circuit Court of the proper county," &c. The other provides that "appeals may be taken from the Courts of Common Pleas and the Circuit Courts to the Supreme Court, by either party, from all final judgments, except," &c. Here is nothing limiting or taking away the right of appeal from the Common Pleas to the Circuit Court, in cases of contest of wills. Under these provisions, a party in such case may appeal either to the Circuit or Supreme Court in all cases of final judgment.

We are of opinion that the motion to dismiss the appeal was correctly overruled.

The motion for a new trial was based upon supposed errors in the instructions of the Court to the jury. No errors have been pointed out in any of the instructions, except the first, which is as follows, viz.:

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“To make a valid will, it is necessary that it should be signed by the testator, or his name should be signed to it by some one in his presence by his authority, and the signature should be attested by two witnesses subscribing their names in the testator’s presence.”

The statute provides that “no will, except a nuncupative will, shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses,” &c. 2 R. S. p. 314, § 18.

The objection made by counsel to the above instruction is, that it “decides that it is not only necessary that the signature should be attested by two witnesses, but that it should be proved by two witnesses.”

We do not understand the charge as meaning that the signature of the testator to the will must be proven by two witnesses, but simply that the execution of the will must be attested by two witnesses. But if the charge was likely to leave the impression on the minds of the jury that it was necessary to prove the signature of the testator to the will by two witnesses, the matter was set entirely right by another charge subsequently given, as follows:

“If, however, the testator had, in fact, signed the will before the witnesses subscribed it, that is sufficient, notwithstanding one of the subscribing witnesses might state that the will was not signed by the testator before he signed it, or afterwards to his knowledge.”

We are of opinion that there is no error in the record, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

G. M. Overstreet and *A. B. Hunter*, for the appellants.

F. M. Finch, for the appellees.

WOOLLEY v. TURNER.

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v.
TURNER.

Husband and wife, under our statute, are incompetent witnesses for and against each other, while the marriage relation exists; but after it ceases to exist, they are competent, as to anything the knowledge of which was not obtained through the privacy of the marriage relation.

But where the relation existed at the time the claim sued upon accrued, it will be presumed, the contrary not being shown, that it still exists.

APPEAL from the *Shelby* Court of Common Pleas.

Saturday,
December 3.

DAVISON, J.—This was an action by *Turner* against *Woolley* upon account, the items of which were filed with the complaint, and are as follows:

Cincinnati, October 11, 1854.

Thomas Woolley to Samuel Turner, Dr.:

To boarding *Catherine Woolley*, the wife of said

Thomas Woolley, 51 weeks from the 11th Octo-

ber, 1853, to date, at 3 dollars per week..... \$153 00

To fuel and lights 20 weeks, at 50 cents per week 10 00

To cash paid for medicines for her..... 20 00

To money paid her during said time, and for medi-
cines..... 65 00

Whole amount..... \$248 00

Proper issues having been made, the cause was submitted to a jury, who found for the plaintiff; and the Court, having refused a new trial, rendered judgment on the verdict, &c.

The record contains a bill of exceptions, which shows that the plaintiff, in support of the issue on his part, offered to read in evidence to the jury the deposition of said *Catherine Woolley*, to the introduction of which the defendant objected, on the ground that she was, at the time the account for boarding, &c., accrued, his wife, and, for aught that appeared, the relation of husband and wife still existed between them; but the objection was overruled, and the deposition admitted, &c.

We have a statutory rule of practice which says: "Husband and wife are incompetent witnesses for and against

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each other; and they can not disclose any communication from one to the other, made during the existence of the marriage relation, whether called as a witness while that relation exists or afterwards." 2 R. S. p. 82, § 240.

As we construe this rule, the husband and wife are incompetent witnesses for or against each other while the marriage relation exists; but that after it ceases to exist, they are competent as witnesses for or against each other, to testify to anything that came under their observation, the knowledge of which was not obtained through the privacy of the marriage relation. *Jack v. Russey*, 8 Ind. R. 180, note 1.

In this case, the bill of exceptions avers that the proposed evidence was resisted on the ground that the witness was, at the time the account sued on accrued, the defendant's wife. Hence we must intend that the ground thus assumed was true, and, in the absence of contrary proof, presume that the relation of husband and wife continued to exist between them when she made her deposition. And this being the case, the deposition should have been excluded, because, as has been seen, husband and wife are incompetent witnesses for or against each other in any case, while that relation exists. 1 Greenl. Ev., §§ 336, 337.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. M' Donald and *A. G. Porter*, for the appellant.

PATTERSON and Others v. WATTS and Another.

Saturday,
December 3.

APPEAL from the *Johnson* Circuit Court.

Per Curiam.—This cause was decided upon demurrer, and to the ruling below the record shows no exception. As this point is made by the appellees, we are not at liberty to pass over it. According to repeated adjudications, there is no question before us for decision.

The judgment is affirmed with costs.

D. Wallace and *J. Coburn*, for the appellants.

W. Herod, *S. Stansifer*, *G. M. Overstreet*, and *A. B. Hunter*, for the appellees.

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MARSHALL
v.
PYEATT.

MARSHALL v. PYEATT.

By our statute (1 R. S. p. 379, § 16), a suit may be instituted by an indorsee against the immediate and remote indorsers, jointly.

If the complaint, in such case, to show failure of consideration, allege that the defendants had due notice of the suit against the maker, a paragraph of the answer traversing the allegation, is good.

But a paragraph charging that, by agreement with the maker, the plaintiff fraudulently put off the trial from term to term, without notice to the defendants, and without their knowledge or consent, by means whereof the defendant lost the benefit of the assignment to him, &c., was *held* bad, as being inapplicable to the case made by the complaint.

Though, as a general rule, an indorsee of a promissory note assignable under the statute, cannot recover against the indorser unless he has used diligence against the maker, yet he may allege and prove an excuse for lack of diligence.

APPEAL from the *Grant* Court of Common Pleas.

Saturday,
December 3.

DAVISON, J.—The appellee, who was the plaintiff, sued *John D. Marshall* and *Daniel Dwiggins*, upon the assignments of two promissory notes. The notes were given by *M. and G. Osgood* to *Fisk* and *McCord*, and bear date *October 25, 1850*. One of them is for 110 dollars, payable *May 1, 1852*; and the other, for 40 dollars, due at nine months.

On the 30th of *November, 1850*, *Fisk* and *McCord*, the payees, assigned both notes to *Marshall*, who indorsed them in blank to *Dwiggins*, and he, by a like indorsement, transferred them to the plaintiff.

In *March, 1854*, *Pyeatt*, the plaintiff, instituted suit on the notes, against the makers, in the *Fulton* Court of Common Pleas, and at the *July* term, 1855, of that Court, there was, in favor of the makers, a verdict and judgment, on the

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ground that the consideration upon which the notes were given had failed.

In the complaint, it is avered that *Marshall* and *Dwiggins*, the present defendants, were duly notified of the pendency of the suit against the makers of the notes, and the grounds upon which it was resisted; and that *Marshall* attended, was present when the cause was tried, and aided in its prosecution, &c.

In the present case, *Dwiggins* was called and defaulted. *Marshall* appeared and answered in seven paragraphs, five of which were subsequently amended. Demurrers were sustained to the second and fifth, and upon the others, issues were made. There was a verdict for the plaintiff. Motions for a new trial, and in arrest, were overruled, and judgment rendered, &c.

The suit, as we have seen, was instituted jointly against the immediate and remote indorser. Hence it is insisted that the proceedings are erroneous.

Anterior to the present code, this position would have been tenable. *Ewing v. Sills*, 1 Ind. R. 125. But the rule now is, that the holder of any note or bill of exchange negotiable by the law merchant, or by law of this state, may institute one suit against the whole or any number of the parties liable to such holder, &c. 1 R. S. p. 379, § 16. This provision seems to be decisive that the remedy adopted in this case, by joint suit against the defendants, is unobjectionable.

The next inquiry relates to the action of the Court in sustaining the demurrers to the second and fifth paragraphs.

The second avers that "it is not true, as alleged, that defendants had notice of the pendency of the suit instituted against the makers of the notes, in the *Fulton* Court of Common Pleas, and he avers that they had no such notice," &c.

The complaint, as has been seen, in order to show that the consideration of the assigned notes had failed, relies solely on the result of the suit against the maker, in the *Fulton* Court of Common Pleas, and avers that of that suit

the defendants had due notice. This averment was material; because, if they had such notice, the judgment in that case was, as to such failure of consideration, conclusive against the defendants. And it seems to follow, that the second defense, being a denial of the alleged notice, is well pleaded; because it directly controverts an allegation which was essential to the maintainance of the action, and which the plaintiff was bound to prove. Our conclusion might be otherwise, had the complaint contained an independent, affirmative averment that the consideration of the notes had failed. *Howell v. Wilson*, 2 Blackf. 418. As the defense stands, it constitutes a bar to the action.

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V.
PYEATT.

The fifth paragraph is as follows: "By agreement with the makers of the notes, the plaintiff fraudulently put off the trial of said cause in the *Fulton* Court of Common Pleas, from term to term, without notice to the defendants, and without their consent or knowledge, by means whereof the defendant has lost the benefit of the assignment to him," &c.

This defense is not applicable to the case made by the complaint, and is, therefore, defective. True, the indorsee of a promissory note, assignable under the statute, is not allowed to sue the indorser, unless he has used due diligence against the maker for the recovery of the note (1 R. S. p. 378, § 4); still he may allege and prove an excuse for not using such diligence. In this instance, the plaintiff, in his complaint, relies on such excuse, viz., that the consideration of the assigned note had failed, while the defense, in effect, is, that he had failed to use the diligence required by the statute. Hence, it neither controverts nor avoids any averment in the complaint, and cannot, therefore, be held a valid pleading.

For the error, in sustaining the demurrer to the second paragraph of the answer, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Steele, H. D. Thompson, and M. L. Marsh, for the appellant.

J. F. McDowell, for the appellee.

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THE TOLE-
DO, &C.,
RAILROAD CO.

v.
FISHER.

Saturday,
December 3.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
MEAD.

APPEAL from the *Washington* Circuit Court.

Per Curiam.—This case is like that of the same company v. *Tilton*, reported in 12 Ind. R. 3; and, upon the authority of that case,

The judgment is affirmed with 1 per cent. damages and costs.

W. G. Cooper, for the appellants.

C. L. Dunham and *H. Heffren*, for the appellee.

THE TOLEDO, WABASH, AND WESTERN RAILROAD COM-
PANY v. FISHER.*

Saturday,
December 3.

APPEAL from the *Miami* Court of Common Pleas.

PERKINS, J.—Suit by *Stearns Fisher* against the *Toledo, Wabash, and Western Railroad Company*, for work done and materials furnished. Judgment for plaintiff for a fraction over 134 dollars.

The errors assigned are—

1. The refusal of a continuance.

There was no error in this. No diligence was shown.

2. The admission of proof of the declarations of one *Brown*.

But the proof is abundant that he was the agent of the railroad company. If not so by original appointment, he was made so by a recognition of his acts while in performance. The company saw what he was doing, and paid some of his bills. Such being the fact, his declarations, which were a part of the *res gestæ* of his acts, within the

* An earnest and able petition for a rehearing of this case, filed by Mr. *Stuart*, on the 23d of *December*, was afterwards overruled.

scope of his agency, were legitimate evidence. *Tomlinson v. Collett*, 3 Blackf. 436.—*The Wayne County, &c., Co. v. Berry*, 5 Ind. R. 286, 289. And if such declarations are erroneously admitted before proof of the agency, subsequent proof of the agency were then error. *The Trustees, &c. v. Bledsoe*, 5 Ind. R. 133. The case does not necessarily raise a question upon the power of sub-agents.

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BERRY
v.
BOLAN.

3. Excessive damages.

The jury allowed the account. There was evidence tending to prove it.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

N. O. Ross, R. P. Effinger, and W. Z. Stuart, for the appellants.

H. J. Shirk and J. M. Wilson, for the appellee.

CONLEY v. CONLEY and Others.

APPEAL from the *Wayne* Court of Common Pleas. Saturday,
December 3.

Per Curiam.—The judgment in this case is affirmed with costs, upon the authority of *Holland v. Moody*, 12 Ind. R. 170.

C. H. Test, J. M. Wilson, and J. B. Julian, for the appellant.

O. P. Morton and C. H. Burchenal, for the appellees.

BERRY and Another v. BOLAN.

APPEAL from the *Kosciusko* Court of Common Pleas. Saturday,
December 3.

Per Curiam.—This case is decided upon the authority of *Patterson v. Crawford*, 12 Ind. R. 241.

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The judgment is affirmed with 5 per cent. damages and costs.

CONKEY
v.
AMIS.

J. S. and G. W. Frasier, for the appellants.
G. D. Copeland, for the appellee.

CONKEY and Another v. AMIS.

Where a levy was wrongfully made upon part of a lot of saw-logs, without distinguishing what part, and the part levied upon was sold without being pointed out or separated from the rest, and the purchaser never took possession or attempted to exercise any control over the property, it was *held*, that an action in the nature of trespass, would not lie against the officer and the purchaser.

Saturday,
December 3.

APPEAL from the *Vermillion* Court of Common Pleas.

WORDEN, J.—Complaint by the appellee against the appellants, alleging, that on, &c., at, &c., the plaintiff was the owner and possessed of fifty saw-logs of the value of 300 dollars, and ten thousand feet of lumber of the value of 200 dollars; that the defendants then and there, without leave, wrongfully took and carried away said property and have not returned the same, and other wrongs then and there did, to the damage of the plaintiff, &c.

There were answers in denial, and other pleading not necessary to be stated in this opinion.

The cause was tried by a jury, and a verdict found for the plaintiff for 70 dollars, on which judgment was rendered, over a motion for a new trial.

On the trial there was no evidence touching the lumber, and the alleged trespass to the logs was, in substance, as follows:

The plaintiff had forty-two logs in a certain mill-yard. The defendant, *Bright*, as a constable, had in his hands an execution issued to him by a justice of the peace, on a judgment in favor of *Conkey*, the other defendant, and against one *Wilson N. Amis*. *Bright*, by the direction of

Conkey, levied the execution upon forty of the logs in question, as the property of said *Wilson N.*, and offered them for sale, and they were bid off by one *John Davidson*. No money was ever paid by *Davidson* on his purchase, but he afterwards gave *Conkey* his note for the amount due on the execution, as also for a small note and account due from *Wilson N.* to *Conkey*. This was by virtue of an agreement between the three. The note at the time of the trial, was not due, and nothing had been paid on it. No particular forty logs out of the forty-two, were levied upon and sold, nor were they, in any manner, separated from the forty-two pointed out or designated. Neither of the defendants, nor *Davidson*, has ever taken actual possession of the logs, but they still lie where they did when bid off by *Davidson*, and in same situation.

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CONKEY
V.
AMIS.

The defendants, at the proper time, asked the following, amongst other instructions, which were refused, and exception taken, viz.:

“That the defendants are not liable in this action without proof that they have taken possession of the property in dispute, or assumed some control and dominion over it; and though the actual levying upon property may be sufficient under ordinary circumstances, yet if the levy was upon a part of the whole, and the subsequent sale was for a part of the whole, without distinguishing which part, no property passed by such levy and sale; and if the defendants did not take possession of said property, but at all times suffered it to remain in the possession of the plaintiff, and as it was at the time of the alleged levy, such levy and sale would not make the defendants trespassers, and liable in this action.” “If the defendants, or either of them, have not injured the plaintiff in his possession of the property in dispute, the plaintiff cannot recover.”

We are of opinion that the charges thus asked should have been given. We shall not stop to inquire what would be the effect of a levy and sale of a part of the logs out of the whole, without, in any manner, separating them, or otherwise designating or pointing out the part

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CONKEY
v.
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thus levied upon and sold; because the sale of one man's property on an execution against another, would be void, and the title of the owner would not be divested by such sale; and the proceeding could be made no worse by the fact that the levy and sale were so irregular and defective that no title would pass, had the property levied upon and sold belonged to the execution-defendant.

The sale in question did not and could not divest the plaintiff of his title, and unless his possession has been in some manner interfered with, or unless "some dominion or control over it," has been assumed, he has clearly failed to make out his case, and cannot recover. He has failed to show, as charged, that the defendants wrongfully "took and carried away" the property. How has the plaintiff's property been injured?

"Trespass, in the most extensive sense, means any injury to another's person or property from the misfeasance or act of another." 3 Steph. Nisi Prius, 2629. "The gist of the action of trespass is, the injury to the possession." *Id.* 2632.

The property in question has not been touched, or in any manner interfered with. How has the plaintiff been injured by the officer going through the useless and vain formality of levying upon and selling it? If he has been injured by such nugatory levy and sale, the injury is not shown in the evidence.

The motion for a new trial, based upon the refusal of the Court to give the charge, should have been sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher, for the appellants.

THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAIL-
ROAD COMPANY v. BIVENS.

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THE MICHIGAN,
&c.,
RAILROAD CO.
v.
BIVENS.

Unless otherwise instructed by the Court, the jury may render either a general or a special verdict; but upon the request of either party, the Court must direct a special verdict upon all or any of the issues; and if requested by either party, the Court must direct the jury, that *if they find a general verdict*, they must find specially upon particular questions of fact.

Where a part, only, of property transported by a common carrier, is injured, and the remainder is safely carried to the point of destination, the consignee or owner cannot, in consequence of the injury to a part reject the part uninjured, and hold the carrier liable for the whole.

The carrier is not made liable for the whole, by a failure to offer to deliver the uninjured part. A carrier by railroad is not bound to make personal delivery of the property to the consignee, nor to offer to deliver it. *Quære*, whether he must give notice of its arrival.

It is the duty of the consignee to repair to the depot or place of delivery, for his goods, and the carrier cannot be sued for non-delivery unless there has been a refusal to deliver on request.

APPEAL from the *Elkhart* Court of Common Pleas.

Saturday,
December 3.

WORDEN, J.—Suit by the appellee against the appellants.

The complaint alleges in substance that the appellants, on, &c., at the town of *Elkhart*, &c., as common carriers, received from the appellee eight thousand one hundred feet of lumber, to be transported, for a certain reasonable reward, to *Chicago*; that the company so carelessly and negligently conducted themselves in the premises, that, through their negligence, and that of their servants, the said property was greatly damaged, and was afterwards converted to the use of the company, and was wholly lost to the plaintiff.

Answer, in denial.

Trial, verdict, and judgment for the plaintiff, over a motion for a new trial.

A bill of exceptions was filed, containing evidence adduced on the trial; but it is insisted, by counsel for the appellee, that, as the formula of the 30th rule is not followed, by stating that "this was all the evidence given in the cause," the bill should not be considered as showing all the evidence.

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THE MICHIGAN,
& CO.,
RAILROAD CO.
V.
BIVENS.

The rule not being complied with, and the objection being made, we shall determine the case without reference to the evidence.

The motion for a new trial was predicated, amongst other things, upon supposed errors of the Court in giving and refusing instructions to the jury.

The defendants asked the Court to instruct the jury to find specially the following questions of fact, viz.:

1. "Was not about five thousand feet of the lumber specified in the complaint carried by the defendants for the plaintiff to *Chicago*?"

2. "Was there ever any demand on the part of the plaintiff on the defendants, for the lumber thus carried to *Chicago*?"

This the Court refused, and, we think, correctly. Unless otherwise directed by the Court, the jury might render either a general or a special verdict; but upon the request of either party, the Court must direct a special verdict upon all or any of the issues; and if requested by either party, the Court must direct the jury, if they render a general verdict, to find specially upon particular questions of fact. 2 R. S. p. 114, § 336. The Court had not directed, nor had it been requested to direct, the jury to find a special verdict, and they were at liberty to find generally or specially, and as they could only be required to find specially upon particular questions of fact, in case they should elect to find a general verdict, the unqualified direction asked, was properly refused. The jury should be required to answer particular questions of fact, only in case they should find a general verdict.

The defendants asked several instructions, which were refused. The evidence not being considered as before us, we must presume that if the charges were correct in point of law, they were refused as not being applicable to the evidence.

The following instruction was given, to which exception was taken by the defendants, viz.:

"That if, in case the common carrier contracts to carry property of a particular character, as, in this case, a par-

particular kind of lumber, and the same is injured, and a portion of it, only, safely carried to the point of destination, and the carrier wishes the owner or consignee to accept that portion which is uninjured, it is necessary for him to make an offer to deliver the same, and then it is at the option of the party to receive it or not; and if no such offer is made, the carrier will be liable for the full amount of the value of the property."

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BIVENS.

This charge, in our opinion, was wrong, as applied to any supposable state of facts that might have been legitimately proven on the trial of the cause. Can it be said that when a part only of the property to be transported, is injured, but the remaining "portion is safely carried to the point of destination," the consignee or owner can, in consequence of the injury to a part, reject the part thus uninjured, and hold the carrier liable for the value of the whole? We think not. Suppose several car-loads of wheat are to be transported, all of which, except one, arrive safely and without injury, but the one is damaged by rain in consequence of the insufficiency of the car, can the consignee or owner reject the car-loads thus uninjured, in consequence of the damage to the one?

This question is settled by authority. It is said by a standard author, that "where the goods are only damaged, the owner is still bound to receive them, and cannot abandon, and go against the carrier as for a total loss. But whether the owner have accepted the goods or not, he may recover for any deterioration they may have sustained, unless by the excepted risks in the carrier's undertaking." Redf. on Railw. 320.

In *Shaw v. The South Carolina Railroad Co.*, 5 Rich. 462, it was held, that "where the goods in the carrier's possession are uninjured in quality, but there is a partial loss, the owner cannot abandon the goods and recover their entire value; he can recover only the price, at the place of delivery, of the goods actually lost." The fact that a part of the goods are injured merely, instead of being entirely lost, furnishes no reason for the application of any different rule.

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&C.,
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BIVENS.

The charge given is also erroneous in stating that it was necessary for the carrier to offer to deliver the uninjured property, and if no such offer was made, he would be liable for the full amount of the property.

Whatever may be the duty of a common carrier, who, by the course of his business, is accustomed to make a personal delivery, at the residence or place of business of the consignee, and whose mode of transportation admits of such delivery, it is settled abundantly that a carrier by railroad is not bound, as a general proposition, to make such personal delivery.

In Redfield on Railways, p. 251, the author says: "We understand the cases to have settled the question, that the carrier by railway is neither bound to deliver to the consignee personally, or to give notice of the arrival of the goods." The latter branch of this proposition will be remarked upon hereafter. On page 252, the same author says: "The cases all agree that in regard to carriers by ships and steamboats, nothing more is ever required, in the absence of a special contract, than landing the goods at the usual wharf, and giving notice to the consignee, and keeping the goods safe a sufficient time after, to enable the party to take them away. * * * The course of doing business upon railways, in being confined to a particular route, having stated places of deposit, and generally erecting warehouses for the safe keeping of goods, all seem to require that the same rule, as to the delivery of goods, should prevail, which does in transportation by ships and steamboats."

In Edwards on Bailments, p. 515, it is said, that "since ships and vessels must stop at the wharf, and railroad cars at the depot, notice given to the consignee of the arrival of the goods and of their place of deposit, is taken by custom in lieu of personal delivery."

Whatever diversity there may be in the decisions in respect to the necessity of notice to the consignee, in order to discharge the carrier, there is little or none in respect to the point now under consideration. The goods carried by railroad, having arrived at the proper depot, and the con-

signee having been notified of their arrival, the carrier is under no obligation to seek out the consignee and make an offer to deliver them. It is the business of the consignee to repair thither to receive the goods, and if the carrier refuse to deliver them on request, no valid excuse being shown, an action will, of course, lie for their non-delivery.

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The fact that some of the goods have been damaged in their transit, can make no difference in the application of the principle. We have seen that such injury does not authorize the consignee or owner to reject the goods entirely, and hold the carrier liable as for a total loss; neither does it devolve upon the carrier any obligation to make an offer to deliver, otherwise than as if the goods had all arrived uninjured.

The counsel for the appellee have, with much ability and research, discussed the proposition, involved in the foregoing quotation from *Redfield*, that a carrier by railroad is not bound to notify the consignee of the arrival of the goods. Upon this point, Judge REDFIELD cites the case of *The Norway Plains Co. v. The Boston and Maine Railway*, 1 Gray, 263, and *The Farmers and Mechanics' Bank v. The Champlain Transportation Co.*, 23 Verm. R. 211. If these cases be considered as deciding the proposition, there are others which hold the other way; as the case of *The Michigan Central Railway v. Ward*, 2 Mich. R. 538; this, however, was decided upon a statutory provision. In *The Rome Railway v. Sullivan*, 14 Geo. R. 277, notice is held to be necessary on general principles. *Vide Redf. on Railw.*, note p. 255.

We shall not decide nor further discuss this proposition, because its decision is not necessary to a determination of the case before us. When it shall arise, there will be time for its determination. For the purposes of this case, it may be admitted that the liability of a carrier by railroad continues until the goods have arrived, and are safely stored in the proper depot, the consignee duly notified, and until a reasonable time has elapsed, after notice, for the consignee to remove his goods; and yet it would by no means follow that the carrier would be bound to

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make an offer to deliver them. As before remarked, it is the duty of the consignee or owner to repair to the depot, or place of delivery, for his goods, and the carrier cannot be sued for their non-delivery, unless there has been a refusal to deliver on request.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles, for the appellants (1).

J. A. Liston and *R. Lowry*, for the appellee (2).

(1) Extract from *Mr. Niles's* brief:

A railroad company, unlike a stage or express wagon running through the streets of a town, is not bound to deliver freight at the place of business or residence of the owner or consignee. *SHAW*, Chief Justice, in *The Norway Plains Co. v. The Boston and Maine Railroad Co.*, 1 Gray, 271, says: "The nature of the transportation (by railroad) though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line and delivered at the termination, or at some fixed place by its side at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of *BULLER, J.*, in *Hyde v. The Trent and Mersey Navigation Co.*, 5 T. R. 397: A ship trading from one port to another, has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." It would be absurd to argue that a railroad company is bound to deliver heavy lumber like that described by the witness in this case, except at their proper station. Neither are they bound to give notice of the arrival of goods at the point of destination. The consignor is expected to advise the consignee of the shipment, and if they happen to be the same person, he has all the information which he needs. As is remarked by Chief Justice *SHAW*, in the case referred to above, "the arrivals of goods at the large places to which goods are sent by railroad, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods, or single article forwarded by the trains." *Redf. on Railw.*, 249.—1 Gray, 263.

If part of the lumber was carried to the point of destination, the plaintiff was bound to accept it, and he is entitled only to his actual damages, occasioned by the loss or injury of the balance. In the nature of the case, part of a lot of square oak timber may be injured or lost without destroying wholly the value of the remainder. If the doctrine announced in the instruction to the jury in this case is correct, then when a railroad company undertake to transport cattle, and some are injured so that the company may think it best to kill them, in order to save their hides and tallow, they thereby assume an entirely new and increased responsibility as to the others—at least so far as to be required, contrary to the general rule, to look up the consignee, wherever he may be, and make a formal tender of the remaining cattle. And even then, according to the instruction, it would be optional with the consignee to receive them or not. Where goods are only damaged or partly lost, the owner is still

bound to receive them or what remain, and cannot abandon them and go against the carrier as for total loss. See this subject discussed in *The Chicago, &c., Railroad Co. v. Warren*, 16 Ill. R. 502; Redf. on Railw., pp. 320, 321.

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(2) Counsel for the appellee submitted the following argument:

The appellants' counsel, in his brief, says, that "the evidence is all set forth in a bill of exceptions." The learned counsel is greatly mistaken. The record shows no such thing. The bill of exceptions to which he refers, ends with this language, to-wit, "and which was all the testimony adduced on the trial of said cause." It does not comply with rule 30 of this Court, and therefore can avail him nothing. See *Meeker v. Patty*, 6 Ind. R. 467; *Ausem v. Byrd*, *id.* 475. These authorities are sufficient to dispose of his bill of exceptions, and that virtually disposes of the whole case; but we will look a little further into the record, and see what merit the appellants have in the remaining errors assigned.

The complaint charges that the appellants, as common carriers, undertook to safely convey the lumber of the appellee from *Elkhart, Indiana*, and deliver five thousand six hundred feet of said lumber to *F. D. Wilson* (who must be regarded as a consignee,) at the *Rock Island* repairing shop, in the state of *Illinois*; and the remainder, two thousand five hundred feet, of said lumber, was to be delivered to *D. C. Harley* (who must also be regarded as a consignee,) in the city of *Chicago*, in *Illinois*; that by carelessness, &c., the lumber was greatly damaged, and was afterwards converted by the appellants to their own use, and was wholly lost to the appellee. The learned counsel admits, in his brief, that the general denial in the appellants' answer, is all of the answer that need be noticed. The evidence is not objectionable. The witness testifies that he went in search of the lumber, and was at *Chicago*, and saw the agent of the appellants, one *Bacon*, who pointed out, in one corner of the appellants' lumber yard, lumber, as being part of plaintiff's, and said that the lumber had been injured in the "smash up" on the railroad of the appellants; and *Bacon* also told witness that he had charge of the place of reception of lumber of the appellants, at *Chicago*. It is a sufficient answer to the appellants' objection, that *Bacon* was there in charge of the lumber yard, exercising control over it; that was a fact. Thus far the witness testified to facts of his own knowledge; and as to what *Bacon* told him, as to his being the agent of the railroad company, and having charge of the place of reception of lumber of appellants at *Chicago*, the learned counsel will find himself in this predicament, that if *Bacon* was not the agent, yet he had the custody of the lumber yard, and of the plaintiff's damaged and converted lumber. These were facts, which the witness saw; and what *Bacon* said on that occasion, was with reference to the subject-matter of the lumber, then in his custody, and which the witness then and there saw at the time, in a damaged, mutilated, and converted condition. And on the other hand, if *Bacon* was the agent of the appellants, and the law (in the absence of proof) will presume it, from the circumstances, as he was then and there acting in that capacity, and professing to act in that capacity, at a place where the company had an established place of doing business; and as the company can only do business by and through their agents, and, in one aspect or the other, the acts and declarations of *Bacon* are part of the *res gestæ*, and were proper for the jury to consider with the other facts, then, if he was such agent—and it was for the jury to judge from all the facts

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and circumstances—the appellants are bound by the acts and statements of *Bacon* to the witness, as the company can only act and speak by and through their agents; and in either view of this part of the evidence, it was not objectionable, and was clearly admissible in one aspect or the other, and it matters not which, as it most clearly proves a conversion of the lumber by the appellants, as it is not pretended that it was ever delivered or offered; and here no demand was necessary. “The law never requires a vain thing.” *Broome’s Leg. Max.* There is another fatal objection. The counsel did not point out to the Court below his objections to the evidence. *Rogers v. Lamb*, 3 Blackf. 155.—*Russell v. Branham*, 8 id. 277. He did object to *C. W. Bivens’s* evidence as to what he saw and heard from *Williams*, the superintendent of the western division of the railroad. This part of the evidence was given in proof of the conversion. There is proof enough to sustain the verdict without it. This is the only objection to the evidence.

“A common carrier remains liable until the actual delivery of the goods to the consignee; or, if the course of the business be such that delivery is not made to the consignee, his liability continues until notice of the arrival of the goods be given.” *Gibson v. Culver*, 17 Wend. 305.

“The rule of law is the same in respect to a carrier by water, as to a carrier by land.” *McArthur v. Sears*, 21 Wend. 190.

“The undertaking of the carrier to transport the goods to a particular place, necessarily includes the duty of delivery there in safety.” *De Mott v. Lareway*, 14 Wend. 225.

“Generally a carrier is bound to deliver goods personally to the consignee; but when transportation is by vessel or boats, notice of arrival, and of the place of delivery, is sufficient; and if the consignee is absent, refuses to receive, or cannot, after reasonable search, be found, the carrier may discharge his liability by storing the goods with a responsible party, for account of the owner, in relation to whom the storekeeper becomes bailee.” *Fisk v. Newton*, 1 Denio, 45.

“Common carriers are liable for every injury which happens to goods entrusted to their care, unless it be caused by the act of God (inevitable accident) or of the enemies of the land.” *Colt v. M’Mechen*, 6 Johns. 160.—*Kemp v. Coughtry*, 11 id. 107.

“Where goods were put on board of defendant’s vessel to be carried to *Albany*, and, on arriving there, were, by defendant’s directions, put upon the wharf, held, that this was not a delivery of the goods to the consignee, and that the evidence of usage to deliver goods in this manner, was immaterial; that the defendant was liable in trover for such part of the goods as were not actually delivered to the consignee.” *Ostrander v. Brown*, 15 Johns. 39.

“Where the goods are embezzled or lost during the voyage, the master is bound to answer for the value of the goods missing, according to the clear net value of goods of like kind and quantity at the port of delivery.” *Watkinson v. Loughton*, 8 Johns. 213.

“The law of common carriers is one of great rigor.” *Boyce v. Anderson*, 2 Pet. 155.

“The servants of a corporation are no more and no less than the servants of natural persons, and whatsoever is negligently done or omitted by them, is, as to the public, the employer’s act.” “Public policy demands that the law should be applied as rigidly to railroad companies as to any other species of

passenger carriers." *Gillencrater v. The Madison, &c., Railroad Co.*, 5 Ind. R. 339. Nov. Term, 1859.

"The liability of a carrier, under a bill of lading, continues until the merchandise is safely delivered to the consignee, at the port of discharge, or placed in such a situation there, as to be equivalent to a safe delivery; and the carrier is not discharged of the custody of the goods until this is done, * * and he gives reasonable notice to the consignee thereof. * * * Such landing, with such notice, is equivalent to a personal delivery." 2 Am. Law Reg. 563. —*Voss v. Allen*, U. S. Dist. Court, N. Y. in Admiralty, February term, 1854. See Ang. and Ames on Corp., § 310. This rule is applicable to common carriers, navigating inland lakes and rivers; and to carriers by land the rule is more rigid. The rule as to inland common carriers is laid down in the cases of *Fisk v. Newton*, 1 Denio, 45; *Crawford v. Clark*, 15 Ill. R. —; *Scholes v. Ackerland*, *id.* —. See the case of *The Grafton*, 1 Blatch. 175.

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The third error assigned is not well taken. By 2 R. S. p. 114, § 336, in all cases, when requested by either party, the Court shall instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. There are two fatal objections to the assignment:

1. The appellants asked no such instructions as the statute authorizes. They asked the Court to instruct the jury absolutely to find, and not conditionally, as the statute provided, "if they rendered a general verdict." The Court correctly refused to give the absolute instructions to find specially; and the appellants did not ask for them in any other manner.

2. The second objection is, that the request to instruct the jury to find specially, was entirely irrelevant to the matters in issue. The complaint charges that the appellants undertook to convey the lumber safely for the appellee, from *Elkhart* to *Chicago*, to be delivered in parcels, to two consignees. Whether the appellants ever carried the lumber to *Chicago* is immaterial, as they never delivered it to the consignees, nor ever gave them notice, as they were bound to do. See authorities, *supra*. But, on the contrary, they converted the lumber to their own use. A conversion dispenses with a demand. "Conversion may, therefore, be either direct or constructive; and, of course, is proved either directly or by inference. * * * Using a thing, without license of the owner, is a conversion; as is also the misuse or detention of a thing by a finder, or other bailee. * * * If a bailee of goods deliver them over to another, in violation of the orders of the bailor, it is a conversion." 2 Greenl. Ev., § 642. "An admission by the defendant, that he had had the goods of plaintiff, and that they were lost, is sufficient evidence of a conversion, without showing a demand and refusal." *Bristol v. Burt*, 7 Johns. 254. —*Gibbs v. Chase*, 10 Mass. R. 180. "Proof that the defendant promised to return the goods to the plaintiff, and that he had not returned them, is sufficient evidence of a conversion, without showing a demand and refusal." *La Place v. Aspoix*, 1 Johns. Cas., 406.

The fourth error assigned by the appellants is, that the Court below erred in giving instructions to the jury against objections, and also erred in refusing instructions, asked for by the appellants.

The instructions asked by the appellants are three in number, all of which, as asked, were not applicable to the evidence, and hence not the law in this case; and they were correctly refused by the Court. The instruction given by the Court is substantially the law applicable to the evidence.

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"As a general rule, where goods are intrusted to a carrier, and they are not delivered according to contract, the value of the goods, with interest thereon from the day when they should have been delivered, is the measure of damages." See Sedgw. on Dam., 355.—*Ludwig v. Meyre*, 5 Watts and Serg., 435.—*Hand v. Baynes*, 4 Whart. 204.—*Segura v. Reed*, 3 La. R. 695.

"It is the value of the article at the place of delivery, that the plaintiff, relying on the carrier, has lost; it is that value which he would have received, if the contract had been performed." Sedgw. on Dam. 356.—*Brunt v. Boulby*, 2 B. and A. 932. The ground of the ruling is, that it is a breach of contract. "The damages should afford the plaintiff an adequate indemnity for the loss sustained at the time the injury happened. * * * The fair test of its value, and consequently of the loss to the owner, is its price at the time in the market." *Smith v. Griffith*, 3 Hill, 333.

"As the liability of the carrier begins with the delivery of the goods to him, so it continues until the delivery of the goods by him. For he is bound not only to carry them to their destined place, but to deliver them to the bailor, or as he may direct." 1 Pars. on Cont. 657. "And this he must do within what shall be a reasonable time, judging from all the circumstances of the case; and within the proper hours of business, when the goods can be received and properly stored." *Id.*, note (m). "It seems to be usual with railroads not to send the goods out of their depots. There is no objection to this usage strengthening itself into law. But we think, in that case, that the railroad carrier should give notice forthwith, on the arrival of the goods, to the consignee, if his residence is known, or can be found by any reasonable exertions. We think the law should be held to make this requirement, and that any usage against it would be so far against public policy, that it might well be doubted whether it should be permitted to control the law; at least, not unless it were quite universal, and well known to all." *Id.*, pp. 558, 662, 663, 664, and notes.

Parsons speaks of "the usage strengthening itself into law," respecting railroad companies as common carriers; still, it is not yet the law, but whenever it may be recognized as the law, yet "they are bound to give notice forthwith, on the arrival of the goods, to the consignee." The mere innate power of Courts cannot create a usage. They can only adjudge, when satisfied by proof, that a usage exists, or has acquired, by its existence, the force of law. "A custom derives its force from the tacit consent of the legislature and the people, and supposes an original actual deed or agreement." 2 Black. Comm., pp. 30, 31.—1 Chit. Pr. 288. It follows, therefore, there can be no custom in relation to a matter regulated by law.

"When a custom is public, peaceable, uniform, general, continued, reasonable, and certain, and has lasted 'time whereof the memory of man runneth not to the contrary,' it acquires the force of law." See Bouv. Law Dict. tit. Custom. Any change, therefore, by usage or custom, respecting railroad companies, as to their rights or liabilities as common carriers, is a change of the common law itself, which it is not in the power of any Court in the state, by its mere ruling, to do. It matters not what Courts in other states may have ruled otherwise, on this common-law liability of railroad companies, as common carriers. Such ruling is an usurpation; and is nothing less than judicial legislation—a power belonging to a different branch of the government. Railroad companies are common carriers by virtue of legislative action; they are the creatures of

positive legislative grant, existing in all their rights, powers, duties, and liabilities, by positive law, and not by shifting implications nor new-born views of expediency, regulated by the sliding scale of mere judicial authority, and as fluctuating. The charter is a contract; and if its obligations cannot be impaired to the detriment of the corporation, how can the corporation violate its obligations to the detriment of the public? The rights and duties of common carriers are well settled and defined. Business convenience of railroad companies is one thing; their legal rights and obligations is another. Railroad companies were chartered with reference to existing laws, defining the duties and liabilities of common carriers; otherwise, the pretended modification of their duties and responsibilities would have been incorporated in the grant of their franchises. There is neither injustice nor hardship in this view of their rights and duties; but where would the injustice, and their ability for evil to the public end, under a less restricted interpretation? If their common law rights and liabilities are to be restricted, enlarged, changed, or modified, it is the legitimate business of the legislature, and not that of the Courts.

"A usage in conflict with plain, well established rules of law, is not admissible in evidence in any case, and must be disregarded. We may be permitted to add the remark, that were the Courts, by their decisions, to encourage the growth of these local usages, originating generally in lax business practice or mistaken ideas of law, they might become as great an evil—a source of as much want of uniformity in the law—as was the local legislation of the past—an evil supposed to be eradicated from our political system by the new constitution." "It must be a usage relating to matters of fact, and not to modes of thinking as to the law." *Cox v. O'Riley*, 4 Ind. R. 368, 373.

"Usage of a trade does not require to be immemorial to establish it; if it be known, certain, uniform, reasonable, and not contrary to law, it is sufficient. But evidence of a few instances that such a thing has been done, does not establish a usage." *Bouv. Dict. tit. Usage*.

We do not wish to be understood, that a railroad company may not deliver goods at their depot; but we wish to be understood to say, that they must give the consignee notice forthwith, when the goods arrive at the place of destination, and must deliver them there to the consignee or bailor; and this the company is bound to do in a reasonable time, and within the proper hours of business, when the goods can be received and properly stored; and if the company, without fault on their part, are unable to find the consignee or to give him notice, then they must place the goods in such a situation there, as to be equivalent to a safe delivery, and the company is not discharged of the custody of the goods, as carriers, until this is done; and if the company fails to do this, it amounts to a conversion, and no demand is necessary.

* * * * *

The case of *Thomas v. The Boston, &c., Railroad Corp.*, 10 Met., 477, 478, referred to by Justice SHAW, in his opinion delivered in the case of *The Norway Plains Co. v. The Boston, &c., Railroad Co.*, 1 Gray, does not sustain him on the question of notice, as that was not a question arising in that case. "In the case at bar," says Justice HUBBARD, 10 Met. 477, 478, "the goods were transported over defendant's road, and were safely deposited in their merchandise depot, ready for delivery to the plaintiff, of which he had notice, and were, in fact, in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience."

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The only material question in that case was, as to the character of the liability of the company for the loss of the goods. The facts show that they were liable as warehousemen.

The counsel for the appellant relies on the authority in 1 Gray, 271. See p. 269, where Justice SHAW uses this language: "That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers." Again, at p. 270, "Being liable as common carriers, the rule of the common law attaches to them." "It is sufficient, therefore, to state and affirm the general rule."

The Court does not decide the question of notice, although Justice SHAW, who delivered the opinion of the Court, uses this language at p. 274:

"It is argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees of the arrival of goods. The Court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as business is generally conducted in this country, this rule does not apply."

It will be observed, that the only reason given for the Court being strongly inclined to the opinion, is, as business is generally conducted in this country. This supposes an established usage, changing the common-law liabilities of railroad companies as common carriers—a supposition entirely unwarranted. Usages are facts, to be established by proof, and not by presumption. We have supposed, and we think we are sustained by authority, that where a usage is relied on, it must be shown by proof to exist.

And see pp. 271 and 272, where Justice SHAW uses this strange language: "The Court are of opinion, that the duty assumed by the railroad corporation is," * * * "and, this being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them."

Here the learned justice places his decision on the ground of an implied contract, arising from an assumed duty, known to owners of goods. Has he any authority for this opinion? "It is not necessary, in order to charge the carrier, that the goods are lost *in transitu*, while immediately under his care; for he is bound to deliver them to the consignee, or send notice to him according to the direction; and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable. See 3 Wils. 429; 2 Blackf. 916.

The case of *Hyde v. The Trent, &c., Navigation Co.*, 5 T. R., opinion by Lord KENTON, at p. 395. He says: "On the general point I have great doubts; the leaning to my mind at present is, that carriers are not liable to the extent contended for." So it will be seen that the point is not decided in that case; and furthermore, it was a usage with that company, of which the defendants had notice, to deliver goods by a porter. The plaintiff recovered judgment. And at p. 396, ASHURST, J., says: "I am glad to find one circumstance which put the case out of all doubt, namely, that one of the bills contains a charge for wharfage and cartage, which is decisive to show that in this case the liability of the defendants continued, until the goods were delivered. The inclination of my opinion on the general question is, that a carrier is bound to deliver the goods to the person to whom they are directed." So it will be

seen, that although the question is not decided, yet these two eminent judges differed diametrically in opinion. ASHURST, J., adds: "A contrary decision would be highly inconvenient, and would open a door to fraud." See his reasoning, p. 396. BULLER, J., same page, says: "Upon the general question, my opinion coincides with that given by my brother ASHURST." His whole reasoning is forcible, and sustains our position.

At p. 399, GROSE, J., uses this language: "On the general question of law, I am not so perfectly clear; and if it had been necessary to have decided this case on the general law, I should have desired further time to consider of it. As far, however, as I have considered this case, the strong inclination of my opinion is, that the defendants would be liable as common carriers. The law, which makes carriers answerable as insurers, is indeed a hard law; but it is founded on wisdom, and was established to prevent fraud." At p. 400, he says: "The case of foreign goods brought to this country, depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant; by the general usage, the liability of ship carriers is at an end, when the goods are landed at the usual wharf. On the general question of law, I do not mean to be bound by the opinion I have now given, though at present I think that common carriers are answerable if the goods be lost at any time before they are delivered to the owner."

So it will be seen, that this case in 5 T. R. *supra*, neither sustains the linking of Justice SHAW, in 1 Gray, nor the opinion of the learned counsel for the appellants in the case at bar; but, on the contrary, the weight of that authority sustains the doctrine contended for by the counsel for the appellee.

A person who is a common carrier may, at the same time, be a warehouseman. If the goods are deposited in the warehouse, for the purpose of being carried, such person's responsibility, as a common carrier, begins with the receipt of the goods. See Ang. on Car., § 181; *Forward v. Pittard*, 1 T. R. 27; *Maving v. Todd*, 1 Stark. 72.

In *Hollister v. Nowlen*, 19 Wend. 241, (Ang., § 153,) BRONSON, J., in delivering the opinion of the Court, quotes the opinions of Lord HOLT and Chief Justice BEST, with the view of showing that the law in relation to common carriers is simple, well defined, and, what is no less important, well understood; and in its vindication, he says: "There is less hardship in the case of the carrier than has sometimes been supposed; for, while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if Courts were now at liberty to make, instead of declaring the law, it may well be questioned, whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact, that in *Great Britain*, after the Courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and restored the salutary rule of the common law."

In *Roberts v. Turner*, SPENCER, J., said the carrier is responsible as an insurer of the goods, "to prevent combinations, chicanery, and fraud." 12 Johns. 232.

"The principles of the common law are to be understood with the limitation:

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that there is no special contract between the parties, which varies the general obligation of carriers; for if there clearly appear such a contract, it governs the case." *Ang. on Car.*, § 220.

"The undertaking of a common carrier to transport the goods to a particular destination, necessarily includes the duty of delivering them in safety; and his obligation is to deliver safely at all events, excepting the goods be lost by the act of God, or the public enemy. It is not enough, that the goods be carried in safety to the place of delivery, but the carrier must, and without any demand upon him, deliver; and he is not entitled to freight until the contract for a complete delivery is performed. It appears, therefore, to be of importance to consider what is requisite to constitute a complete delivery, or such a delivery as will determine the transit and dissolve the carrier's liability. This, in a great measure, is left to the jury to determine." *Id.*, § 282.

"The carrier is bound, in all cases, to make a proper delivery, with reasonable expedition, if no particular time be fixed upon." *Id.*, § 283.

"If the goods are tendered to the consignee late in the day, after business hours, the consignee is not bound to receive them at such time, and it is the duty of the carrier to keep them still in his custody, and he is responsible as carrier." *Id.*, § 287.—*Hill v. Humphreys*, 5 Watts and Serg. 123.—*Eagle v. White*, 6 Whart. 505.

"The responsibility of a common carrier on the *Ohio* river, does not cease, it has been held, by delivery of the goods on the wharf, and notice given to the consignee; but the duty of the carrier is to attend to the actual delivery." *Hemphill v. Chenie*, 6 Watts and Serg. 62.

Landing cotton on a wharf in *Charleston, South Carolina*, was held not a delivery, it not being made so by usage. *Galloway v. Hughes*, 1 Bail. 553.

In the absence of usage to the contrary, it has been held in *Vermont*, that a delivery of goods on the wharf is not necessarily a delivery to the wharfinger. *Blin v. Mayo*, 10 Verm. 60.

"The doctrine in respect to all commercial usage is, that to have it take the place of general law, it must be so uniformly acquiesced in by length of time, that the jury will feel themselves constrained to say, that it entered into the minds of the parties, and made a part of the contract." *Rushforth v. Hadfield*, 7 East, 224.—*Gibson v. Culver*, 17 Wend. 305.—*Ang. on Car.*, § 301.

"In *Michigan* it (notice) is required; and the liability of the company, as a common carrier, continues until it is given." *Pierce on Am. Railr. Law*, 451.—*The Michigan Railroad Co. v. Ward*, 2 Mich. R. 538.

"Actual notice is required in *Georgia*, unless dispensed with by usage." *The Rome Railroad Co. v. Sullivan*, 14 Geo. R. 277.

And see *Pierce on Am. Railr. Law*, 449, tit. Notice to the Consignee—Whether it is the duty of the company to give notice of the arrival of the goods to the consignee, is an unsettled question. The idea would have been more truthfully expressed, by saying, that the duty of the company to give notice of the arrival of the goods to the consignee, is not an unsettled question; for it is a settled common-law liability; but by a species of judicial legislation in a few instances, certain judges have assumed to themselves the power of unsettling this well established liability—not for the benefit of the public, but for the purpose of increasing the franchises and immunities, and enhancing the profits of railroad companies to a degree never contemplated by the legislature that created them; and thereby exonerating them from duties and responsibilities

which are required of every other common carrier, in every civilized government where the common law prevails. The effect of thus exonerating railroad companies from giving notice to the consignee, is too serious in its consequences to ever become the settled law in *Indiana*. Such exemption would expose the merchandise and property of the country, conveyed by railroads, to innumerable frauds, embezzlements, and larcenies; which would be committed by irresponsible employes and others, and, in a majority of instances, it would deprive the owner and consignee of his property, and subject it to the caprices of the employes of the company, and to the frauds of irresponsible persons, to whom the bailor would, under no circumstances, willingly consent to entrust his property, and leave him without adequate remedy, or so surround his means of redress with unjust and embarrassing difficulties, as to amount to a total loss. Public policy, public justice, our constitutional requirements, imperatively commanding that our laws shall be uniform, forbid, in unmistakable language, any such invidious change in the law, thus specially favoring railroad companies as common carriers.

The legislature of *Ohio* has secured the rights of her citizens against any such rulings in her Courts in favor of railroad companies; and we trust that *Indiana* may never be necessitated, by the ruling of her own Supreme Court, to follow this example of her sister state.

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The proprietor of city lots induced certain parties to purchase them, by representing, *inter alia*, that he had sold certain other lots in the neighborhood at a certain price, whereas, in fact, he had sold the lots for much less. *Held*, that the representation was sufficient ground for rescission of the contract. A false representation that a street was to be laid out by A., which would afford direct and convenient access to the lots, was *held* to be equally material as to subject-matter, though perhaps not sufficiently specific in its terms. This case is distinguished from *Cronk v. Cole*, 10 Ind. R. 485, and *Barton v. Simmons*, at the present term.

APPEAL from the *Marion* Circuit Court.

Monday,
December 5.

PERKINS, J.—Suit to rescind a contract. Demurrer to the complaint sustained. Final judgment in favor of the defendant.

The contract sought to be rescinded was for the sale and purchase of certain lots in *Dunlop & Co.'s* subdivision of *Morris's* addition to the city of *Indianapolis*. The contract was made in *May*, 1855, and the payments for the lots ran through about two years. The complaint alleges

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that the contract was obtained by the fraudulent representations of *Dunlop*.

The representations are thus set forth—

“The plaintiff further says, that at the time the defendant sold to him the above-named lots, he, the defendant, was engaged in selling off, in city lots, a subdivision of a part of *B. F. Morris's* addition to the city of *Indianapolis*, containing a large number of lots, to-wit, one hundred and five, and had already sold a large number of said lots, and that some of the purchasers had agreed, in their contracts of purchase, to build houses; that the defendant, *Dunlop*, was well acquainted with the situation of said lots, and of their value, and of the probable improvements to be made in said addition and subdivision; that he, the plaintiff, was not acquainted with the value, situation, and prospective improvement of lots in said subdivision; that the same were in a distant part of the city from his residence; that he was not a dealer in lots and real estate, was not acquainted with the value thereof, and relied upon the representations of the defendant in regard to the value and prospective improvement of the lots in said subdivision; that the defendant, at the time of, and before the sale, represented to the plaintiff, in order to induce him to purchase said lots, and to enhance their value in his eyes, and to deceive and defraud him, that from twenty to twenty-five houses would be built in said subdivision during the years 1855 and 1856; that such was the intention of the purchasers of said lots; that the subdivision would be settled within a short time, and built up in the years 1855 and 1856; that Dr. *Lawson Abbett* intended to and would build a large, handsome, and expensive dwelling house in said subdivision during the year 1855. The defendant further represented that he had sold certain lots for the sum of 150 dollars each, in said subdivision, to Dr. *Lawson Abbett*, when, in truth and in fact, he had sold them for 100 dollars each; and the said defendant attempted to induce said Dr. *Abbett* to join him in said misrepresentations, and requested him, *Abbett*, to state that said lots were sold for 150 dollars each, instead of 100 dollars, the

true price. The defendant further represented that it was the intention of *B. F. Morris*, who is the proprietor of the land situate between the said subdivision and said city of *Indianapolis*, to open a street through his said land, during the years 1855 and 1856, and that said *Morris* had agreed with him to do the same, which street would lead directly to the lots of the plaintiff, and would afford to the purchaser of said lots a short and direct route into said city; also, other streets to intersect with the streets of the city running north and south; that said lots are situate a quarter of a mile east of the *Madison* road, and without the opening of the street first above named, by *B. F. Morris*, are inconvenient of access, and in a remote, retired situation from travel and business, and of comparatively little value. The defendant further represented, to show that said lots were in demand, that he had sold seven lots in said subdivision to one *Thomas Records*. The defendant further represented that *B. F. Morris* had agreed to open half an alley on the north side of said subdivision.

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The complaint avers the utter falsity of all the defendants said representations, and charges that they were made with a full knowledge of their falsity, and for the express purpose of deluding and cheating the plaintiff, and that they produced their intended effect.

The complaint shows that the plaintiff has been sued upon the notes as they became due, and has paid; that he has offered to rescind the contract, &c., and shows, *prima facie*, a sufficient excuse for the payment and delay.

The rules of law governing the rescission of contracts are well settled. The difficult question that arises in this class of cases now is, do the facts of the given case bring it within those settled rules of law? Some of the representations alleged to have been made in this case, however they may be regarded in the eyes of honor and morality, cannot be held violations of the common law. As to some, their legally fraudulent character or otherwise, is not clear; but one of those, at least, alleged to have been made, we think, was of matter of fact and not of opinion; was in relation to a matter material in the consideration of the

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contract; was relied upon, and justly, by the purchaser; and, being false, constitutes a ground of rescission.

We refer to the representations, made by *Dunlop*, that he had sold certain of the lots in the addition to certain persons, for certain prices. This representation was of matters of fact. It was not the expression of an opinion simply that those lots were worth such terms; nor was it, like the representation as to the number of houses to be erected, the assertion of future probabilities and expectations, upon which no one could rely with certainty; but it asserted that certain things had taken place—were existing facts, and they were material. What is the usual course of dealing in such matters? What are the data upon which purchasers in new and growing towns in the west form their opinions as to the value of property? They inquire, what do lots sell for in such and such localities, and who buys them; and while, if they were told that, in the opinion of the informant, lots were really worth this or that much, they would be little influenced; if told that such and such lots had actually been sold for a given sum to certain persons, they would feel that they had acquired pretty accurate information of the market value of the property. And we think the assertion was one upon which the purchaser had a right to rely. The means of knowing its truth were not equally open to both parties. *Dunlop* knew for what he had sold the lots. He had perfect knowledge. *Kertz* did not know, and could only ascertain the fact with certainty from *Dunlop* or the purchaser; but the purchaser was under no obligation to give information touching the matter, and might even be interested to give false; besides, he might not be found within any convenient time, or in any contiguous locality where he could be consulted. The rule of law should not require such trouble of a party to such a contract, in finding out whether the representation of facts made by the opposite party was true.

And here a distinction may be noticed between this case and *Cronk v. Cole*, 10 Ind. R. 485. There the representation was not of the sale of particular parcels, but of the

general market price, among dealers, of a commodity of universal traffic, of a commodity whose current price was in almost every newspaper, and could be ascertained at any produce house in the land, if the party did not take a newspaper, a fact we should be sorry to presume. Such, also, in character, was the case of *Barton v. Simmons*, at this term (1).

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The representation as to the opening the street was equally material, as to subject-matter. Of this there can be no doubt.

Without such an outlet the lots could scarcely be worth much. The only doubt we have had on this representation is, as to whether it was sufficiently specific in its terms. Should *Dunlop* be estopped to deny that the agreement he had with *Morris* was one, the execution of which could be enforced? Clearly he intended that *Kertz* should so understand the agreement. This point has not been sufficiently discussed to justify its decision here. We say, as we said in *Newell v. Gatling*, 7 Ind. R. 147, that the complaint makes a case upon its face for a rescission; it is sufficient to put the defendant to his answer, that a trial may develop the facts. We think a careful study of *Shaeffer v. Sleade*, 7 Blackf. 178; *Haight v. Hoyt*, 19 N. Y. R. 464; *Newell v. Gatling*, *supra*; and the same case in 9 Ind. R. 572, and in 12 Ind. R. 118; *Hepburn v. Dunlop*, 3 Cond. R. 513, and the cases collected in chap. xiii., commencing on p. 604 of Rawle on Covenants of Title, and in Smith on Cont., by Rawle, top p. 221, will satisfy the mind that the case made in this complaint is not weaker than some that have been upheld.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Coburn, for the appellants (2).

H. C. Newcomb, *J. S. Tarkington*, *J. Morrison*, and *C. A. Ray*, for the appellee (3).

(1) *Post*.

(2) After a statement of the purport of the representations, Mr. Coburn argued as follows:

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Were the representations of a character such as a Court will regard in cases of this kind?

They were of matters of fact as to streets, as to houses, as to contracts. An agreement to open a street or alley, or build a house, is a fact; a price of a lot sold to another person, and adjoining, is a fact; the intentions of the purchasers and owners were facts; indeed, in many cases, the intention is the great fact. See 6 Gill and Johns. 58.

They were material; for it is material that streets and alleys should be opened directly to town; that houses should be built; that improvements should go on.

They were peculiarly within *Dunlop's* knowledge. They were, as represented, calculated to deceive, and did deceive the plaintiff. *Kertz* put confidence in *Dunlop*, as he (*Dunlop*) knew, or ought to have known, more than all the world beside as to his own addition.

A gross fraud was perpetrated: not a house is built, not a street or alley opened, not a thing done. A large addition is laid out, and it is to grow and fill up, and become populous, and well built, with thoroughfares to the city—and nothing is done.

Now, did the plaintiff delay too long to offer rescission? The bargain was made in *June*, 1855. In the fall of that year, *Kertz* finding that part of *Dunlop's* representations were false, offered to rescind. In *April*, 1857, he offered again to rescind, when he had found that all of them were false, utterly and totally so.

These improvements were to be made during 1855 and 1856, and during that time the notes were maturing, *Dunlop* was suing, and the false and fraudulent representations were being developed, and the fraud being confirmed.

Kertz had a right to wait until all of these representations were proved false.

Kertz could not perhaps have enjoined the collection of any one of these notes until 1857, when the time in which these improvements were to be made had expired. At any rate he was not bound to enjoin each note as it became due, but could take them all at once.

In the full and masterly discussion of the subject of frauds, in the case of *Gatling v. Newell*, 9 Ind. R. 574, we find the law upon which we rely, especially as to lapse of time and a restoration of the parties to *status quo*. See, also, 9 Ind. R. 9.

In this case the land was not sold, and could be restored unincumbered to *Dunlop*. The judgments before the justices intervened; these were nothing more than payments of the notes, of which *Dunlop* cannot complain, and no third party intervened.

Perhaps if *Dunlop* had assigned the judgments, and innocent parties were interested, a Court of equity would refuse to intercede; but here the very man who perpetrates the fraud comes in and acknowledges it, but says it was so long ago, and it is now ratified by a judgment; it was dishonest, but now it is sanctified by a judgment upon default before a justice of the peace. A more astonishing, impudent argument cannot be conceived of.

In the case of *Hunt v. Moore*, 2 Barr, 107 (see note to Rawle on Covenants of Real Title, p. 619, and note), Justice ROYNS says, in view of a similar argument: "Can it be the law that we are to repose no confidence in each other, without being branded with the charge of folly and losing the earnings of a

lifetime. True, says the defendant, I told you a falsehood, but you ought not to have believed one word I said. Had you searched the records you would have discovered it was all untrue. I never can and never will consent that any person shall be permitted in this Court to take advantage of his own wrong."

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This is the language of a judge whose moral sense as well as his sound discrimination revolted at the quiet but monstrous outrages of wily cheat. Going on further he says: "A Court of equity would lay hold of slight circumstances to release a victim to such duplicity. See, also, 6 Yerg. 108; 6 B. Mon. 23; 5 J. J. Marsh. 96; 4 How. (Miss. R.) 451; 3 Sandf. (Sup. C. R.) 526; Clark's Ch. R. 571.

Our own Supreme Court, in the case of *Peter v. Wright*, 6 Ind. R. 194, intimate that frauds are to be established by various circumstances which are slight in themselves. In that case, the judicial mind with a conscientious regard for honesty in dealing, seized upon every badge of fraud to wrest from the wrongdoer his ill-gotten gains. See 22 Pick. 53.

In the case of *Grundy v. Boyce's Executors*, 3 Pet. 210, the Court held that a series of judgments might be rendered, as in this, on installments due for land, and that in the end they might all be enjoined and set aside for fraud; in other words, it was not necessary to try the question upon each installment and create a multiplicity of suits, but that it might all be done at once. And that a misrepresentation is not susceptible of reparation in damages. The law abhors fraud, and does not permit it to purchase absolution or indulgence.

In 22 Pick. 53, it is held not to be necessary that the false representation should be the predominant feature inducing the sale; but it is sufficient if it was a motive at all inducing to the sale. If it was one of several motives acting together, and by their combined force, producing the result, it is proper to be considered.

(2) Counsel for the appellee examined the charges of fraud, in their order, as follows:

1. That *Dunlop* represented to him that from twenty to twenty-five houses would be put up in this subdivision during the years 1855 and 1856, and that such was the intention of the purchasers; that within that time the subdivision would be settled and built up. Those seem rather contradictory allegations—that within two years, twenty-five or thirty houses would be built on the one hundred and five lots, and in the same time they would be fully settled and built up, and if both statements were made, it must be evident that *Kertz* did not believe and rely upon both. It is stated in the complaint, that a large number of the lots had been sold before *Kertz* bought; indeed, he says, the whole of them, and it was not an unreasonable opinion that twenty-five or thirty of them, at least, would be built upon in two years. This was a mere expression of opinion, reasonably founded, we think, and if untrue or mistaken, is no reason for rescinding the contract, for it would offer only a probability of a future advance in the price of the lots, and could not have added, at the time, to their intrinsic value. And it is stated in the complaint, that some of the purchasers of lots had agreed in their title bonds, to build houses on their lots. It was, therefore, very natural that *Dunlop* should express the belief that twenty-five or thirty houses would be erected within the period stated.

2. That *Lawson Abbott*, who had purchased some of the lots, intended to

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build a large and expensive dwelling house thereon in 1855. What particular advantage this would have been to *Kertz*, he does not inform us.

3. That *Dunlop* represented he had sold certain lots to *Abbott* for 150 dollars each, when, in fact, he had sold them for but 100 dollars. He does not intimate that *Abbott's* lots were not worth 100 dollars each, which was 10 dollars more than he (*Kertz*) was to pay, so that the most that can be made of that allegation is, that *Kertz* was disappointed in making a speculation of 60 dollars per lot, and not that they were worth less than he paid. That this is no ground for relief, see *Cronk v. Cole*, 10 Ind. R. 489, and cases there cited.

4. That *Dunlop* represented that it was the intention of *B. F. Morris* to open a street from said subdivision through his land to the city; and that *Morris* had agreed with *Dunlop* to do so; and that he had also agreed to open half an alley on the north side of the subdivision. It is also averred that *Morris* never intended to open said streets and alleys, but that the same are enclosed. Testing this averment by the rule that a pleading is to be most strongly construed against the pleader, and it amounts to nothing more than this—that *Morris* had agreed and intended to open a street already dedicated to the public, for, although it is said that the street was to be opened through the land of *Morris*, there is no averment that he was thereafter to dedicate so much of his ground to the public, or that the street was not already public property. In this view of the case, any person interested had a right to insist on opening the street, and could compel the same to be done; and the wrong of *Morris* in keeping it fenced up, is no cause of complaint against *Dunlop* if he had ever promised *Kertz* to open it.

5. That *Dunlop* represented that he had sold seven lots to *Thomas Records*. How this could have enhanced their value in the eyes of *Kertz*, it is hard to perceive, for if not sold to *Records* they were to somebody else, as the complaint shows that one hundred and five lots were sold, which was all there were.

6. That *Dunlop* fraudulently represented the lots to be worth the price *Kertz* agreed to pay for them, and that they were, in fact, worth but 100 dollars. The complaint shows that *Kertz* lived in the city of *Indianapolis*; he had the opportunity then of acquainting himself with their value, and no action would lie, under such circumstances, for an affirmation of value, though the statement might be too high.

As to the offer of plaintiff to rescind, and the time of the offer:

1. He had discovered the falsity of some of the representations in *September*, 1855, four months after his purchase, but which ones, he does not say. We have a right to infer that he had discovered the falsity of all which were regarded by him as important. He then demanded a rescission; but he shows that he subsequently waived it, for he made a voluntary payment of one note in *January*, 1856, and of another in that year, before *October*, for at that time suit was commenced on the nine and twelve months' notes.

His next demand for a rescission, was on the 15th of *April*, 1857, more than nineteen months after his first offer, and after four more of the unpaid notes had been reduced to judgment. The first of these judgments was rendered in *October*, 1856, after *Kertz* must have known all the facts in reference to improvements to be made in 1855 and 1856, after a lapse of time to fully inform himself as to the value of the lots, and all other matters of complaint. The

next was in *January*, 1857, after the full expiration of the time within which all these alleged inducements were to have been performed, and yet he makes no defense to the suits.

We maintain that *Kertz* could not thus play fast and loose. If he intended by his offer of a rescission in 1855, to put an end to the contract, he should have stood by it; his subsequent voluntary payment of two of the notes was a clear waiver of that offer. If he designed to claim relief on the ground of the subsequent discovery of the falsity of some of the alleged misrepresentations of *Dunlop*, he should have made a valid complaint, stating which of the representations he had subsequently discovered were false. Some of the statements made, are so obviously no ground of relief, that they should, by averment, have been excluded as the basis of a claim for relief of this character. There being no such averment, the Court cannot presume that these subsequent discoveries did not relate solely to such unimportant particulars; indeed, by the rule already stated, the presumption is, that all the material grounds of relief, if any existed, were discovered before the first effort to rescind. A man who had discovered that he had been deceived as to a part of the inducement to make a contract, would naturally seek at once to ascertain whether he had been deceived as to the residue. In this case, all the facts were easily accessible; all the parties, *Morris* included, resided in *Indianapolis*, and the presumption is irresistible, that all the matters complained of which were material, were known to *Kertz* more than a year before his last attempt to rescind.

But we need scarcely consider the question of presumptions arising from the allegations of the complaint, for it seems to us that its language shows affirmatively that all the matters of grievance set forth, except the value of *Abbett's* lots, were known to *Kertz* in *September*, 1855; for he says, after stating the first offer to rescind, that "In hope that said improvements would be made, and buildings be erected on said subdivision, and that said street and alley, through the land of *B. F. Morris*, would be opened and laid out, he was, during the years 1855 and 1856, delayed from a further offer of rescission of the contract of purchase aforesaid; that at this time there is, so far as he can learn, no prospect or preparation of any improvement upon said subdivision, and that he has but recently, within two weeks, discovered the fraudulent representations as to the value of said lots sold to *Lawson Abbett*."

The new discoveries, then, after 1855, were that *Kertz* had been deceived as to the value of the lots sold to *Abbett*, not as to the price agreed to be paid by *Abbett*, but as to their value. If *Dunlop* represented to *Kertz* that *Abbett's* lots were worth tenfold what they sold for, or even exaggerated the value of the lots purchased by *Kertz* himself, it would be no ground of rescission, as the authorities cited show. Under these circumstances we insist that *Kertz* was too late in offering to rescind in *April*, 1857. If a party rescinds on the ground of fraud, he must do so at once, on discovering the fraud. Nor must he continue to treat as his own, property which came to him by reason of the fraud. 2 Pars. on Cont. 278, 279.—*Gatling v. Newell*, 9 Ind. R. 576, and cases there cited.—*Campbell v. Fleming*, 1 Ad. and El. 40.

In this case *Kertz* retains the property and ratifies the contract by making payments voluntarily, months after his alleged discovery of part of the frauds practiced upon him. We think it is evident from his conduct, that he anticipated a speculation in the lots, and held off with the intention of availing

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himself of any increase of market value which might take place, and if the speculation failed, then to repudiate the contract and recover back what he had paid

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ZIMMERMAN v. JUDAH.

Suit upon a promissory note given by *A.*, with *B.* as surety, to *C.*, dated *October 13, 1855*, payable one day after date. The answer of *B.* showed that at the time the note was executed, *A.* and *C.* entered into a contract by which *A.* was to erect for *C.* a certain building, to be completed by the 1st of *November, 1856*. The agreement fixed the amount to be paid, &c. The last clause of it is as follows: "5th. As to the balance, 2,000 dollars, it is agreed as follows: Said *C.* herewith advances to said *A.*, as and for a loan on the note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building as in this contract is provided; and which note, also, shall not become or be payable, so long as said *A.* shall progress with the preparation of materials, and with the erection of said building, so as to warrant the said superintendent in the reasonable expectation of the progress and completion of the work, as is hereinbefore provided. *October 13, 1855.*" Signed by *A.*, by *B.*, as surety, and by *C.* The answer further shows that on the 5th of *June, 1856*, the following further agreement was made, without the knowledge or consent of *B.*, to-wit: that said *A.* and one *D.* should, by the 1st day of *November, 1856*, put an additional story on the building then under contract between *A.* and *C.*, for the further consideration of 1,700 dollars, to be paid on the completion thereof. *Held*, that the second contract was such an alteration of the first, as to discharge the surety.

Monday,
December 5.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Suit upon a promissory note for 2,000 dollars, dated *October 13, 1855*, given by *C. H. Brown*, with *C. Zimmerman* as surety, to *Samuel Judah*, payable one day after date.

It appears by the answer of the defendant, *Zimmerman*, that at the same time that this note was executed, *Judah* and *Brown* entered into a contract, by which *Brown* was to erect for *Judah* a certain building, to be wholly completed ready for occupancy by the first day of *November, 1856*. The agreement fixes the amount to be paid, the

time of payment, &c. The last clause of the agreement is as follows: Nov. Term,
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"5th. As to the balance, 2,000 dollars, it is agreed as follows: Said *Judah* herewith advances to said *Brown*, as and for a loan on a note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building as in this contract is provided; and which note, also, shall not become or be payable so long as said *Brown* shall progress with the preparation of materials, and with the erection of said building, so as to warrant the said superintendent in the reasonable expectation of the progress and completion of the work, as is hereinbefore provided. ZIMMERMAN
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[Signed "Charles H. Brown,
"C. Zimmerman (surety),
"Samuel Judah."

It thus appears that the 2,000 dollars specified in the note sued on was substantially a penalty. If the building was proceeded with and completed according to contract, the 2,000 dollar note was never to be paid. If not, it was to be paid.

The answer further shows, that on the 5th day of *June*, 1856, the following further agreement was made without the knowledge or consent of *Zimmerman*, viz.: That said *Brown* and one *Stokes* should, by the 1st day of *November*, 1856, put an additional story on the building then under contract between *Brown* and *Judah*, for the further consideration of 1,700 dollars, to be paid on the completion thereof.

The answer claims that this agreement was such an alteration of the original agreement, as discharged *Zimmerman*, the surety.

The plaintiff demurred to the answer; the Court sustained the demurrer, and the plaintiff had judgment.

The record discloses nothing by which we can determine whether the contracts for erecting the building were fulfilled or not. The inference from this second contract is, that the execution of the first had satisfactorily progressed up to the 5th of *June*, 1856. And there is another letter

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from Mr. *Judah*, set out in the answer, dated *September 10*, 1856, which admits due exertion on the part of *Brown* in the execution of his undertakings. But the decision of the case here, must rest on the single point, as to whether the second contract above set out was such an alteration of the first as to discharge the surety for the performance of it; and we thus conclude:

The second contract required an additional story to be put upon the building. The building could not be finished under the first contract until after that story was put on, as it could not, till after that, be roofed. That contract did, therefore, increase the difficulty and expense of, and tend to delay the completion of, the first contract, and did, therefore, materially affect its execution, though it states that it is not to do so. It, in fact, made *Zimmerman* surety for the completion by the 1st of *November*, 1856, of the walls of the additional story provided for by the second contract. See *Chit. on Cont.*, 529, 530; *Ind. Dig.* 703.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Barbour, J. D. Howland, H. W. Ellsworth, and S. A. Colley, for the appellant (1).

D. Wallace, J. Coburn, J. L. Ketcham, and I. Coffin, for the appellee (2).

(1) Counsel for the appellant cited *Miller v. Stewart*, 9 Wheat. 681; *Lord Arlington v. Merricke*, 2 Saund. 412; *Pearsall v. Summeret*, 4 Taunt. 593; *The United States v. Boyd*, 15 Pet. 187; *Chit. on Cont.* (7 Am. ed.) 529; *Ad. on Cont.* 670; *Bangs v. Strong*, 7 Hill, 250; *Holland v. Hatch*, 11 Ind. R. 497, and cases referred to in text and note; *McMicken v. Webb*, 6 How. 292; *Nisbet v. Smith*, 2 Bro. Ch. 579; *Rees v. Berrington*, 2 Ves. Jr. 540; *Boulbee v. Stubbs*, 18 Ves. 20; *Croughton v. Duvall*, 3 Cal. R. 69; *Hill v. Bull*, 1 Gilm. 149; *Brigham v. Wentworth*, 11 Cush. 123.

(2) Counsel for the appellee cited, as to gratuitous indulgence, 4 Leigh, 622; 4 Watts, 446; 2 Hall, 185; 5 Wend. 501; 3 Mees. and Welsb. 268; 5 *id.* 250; 3 Penn. R. 439. They also cited 3 Blackf. 373; 4 Ind. R. 158, 283; 2 *Para. on Cont.* 193; 2 Scho. and Lef. 470.

THE BOARD OF COMMISSIONERS OF MORGAN COUNTY v.
GENTRY and Others.

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PETRO
v.
CASSIDAY.

APPEAL from the *Morgan* Court of Common Pleas.

Per Curiam.—There being no errors assigned upon the record in this case, it is, therefore, dismissed.

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December 5.

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135	280
140	550
143	850
136	289
146	229

If a devise be made upon a condition subsequent, the estate vests in the devisee immediately upon the death of the deviser, to be defeated, however, if he refuse or neglect to perform the condition. And where a power is given to the executor to make another disposition of the estate in case of such refusal or neglect, and he proceeds under the power, a party claiming under him in a suit against the devisee for possession, must prove condition broken. Where the evidence showed that the devisee had offered to perform the condition, but the person on whose behalf it was made had refused to accept, and never afterwards asked performance, it was *held*, in support of the verdict of a jury, that the failure to perform was not a violation of the condition, but that the devisee was released from its performance.

APPEAL from the *Fayette* Circuit Court.

Monday,
December 5.

DAVISON, J.—The appellants, who were the plaintiffs, brought this action against *Cassiday*, for the recovery of a tract of land in *Fayette* county. Defendant answered the complaint by a general traverse. Verdict for the defendant, upon which the Court, having refused a new trial, rendered judgment, &c.

Plaintiffs claimed title under a deed executed to them November 26, 1851, by *John McCray*, as executor of *Phineas McCray*, who died in the year 1842, leaving a will, which contains these provisions:

1. "I will and bequeath to my wife, *Sarah McCray*, all my real and personal property during her natural life."

2. "I will to my son, *John*, after the death of my wife, 40 acres of land (describing it), being a part of the farm on which I now live."

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3. "I will and bequeath to my grandson, *Phineas Cassiday*, all the residue of my real and personal property, after the death of my wife; and it is my will that he provide for, and furnish, her food, raiment, lodging, &c., and all other necessary things suitable to her age, during her natural life. And further, it is my will that said *Phineas Cassiday* pay to my grandson, *Thomas Cassiday*, 200 dollars, in one year after my wife's death, and 200 dollars to my grandson, *Aaron Cassiday*, two years after her death, if they shall have come of age, or when they are of age. And further, that he pay to my granddaughter, *Sally Wood*, 100 dollars, in three years after the death of my wife. It is also my will, that my funeral expenses be paid by *Phineas Cassiday*, out of my personal property."

The will then appoints *John McCray*, the testator's son, and *Ebenezer Heaton*, executors, and proceeds: "If the said *Phineas Cassiday* shall refuse or neglect to do all or any of the above-named items, that then my executors sell all my real and personal property so devised to him, at one year's credit, and pay him, *Phineas*, 1,000 dollars out of the same, and divide the residue among my living children."

Heaton never assumed the duties of executor under the will; nor does it appear that he ever qualified himself to act in that capacity.

The real estate devised to *Phineas Cassiday*, is the land in contest. *Sarah McCray*, the decedent's widow, died in *June*, 1851; and in *November* of that year, *John McCray*, as executor, &c., sold and conveyed the premises to the plaintiffs. The defendant is in possession, and claims title under a deed from *Phineas Cassiday*, bearing date *January 27*, 1852.

The devise to *Phineas Cassiday* was plainly upon conditions subsequent, and the estate vested in him immediately upon the death of the deviser, in virtue of the devise, to be defeated, however, if he refused or neglected to perform any of the conditions specified in the will. Upon such refusal or neglect, power was given the executors to sell the land in question; and, as the plaintiffs claim under that power, it was incumbent on them to prove that the

conditions, or some one of them, had been broken by the devisee. *Doe v. Cassidy*, 9 Ind. R. 63. Whether the plaintiffs have or have not made such proof, was for the consideration of the jury, and is really the only question in the case.

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The record contains the evidence. It shows that *Phineas Cassidy* did not provide for and maintain *Sarah McCray*, the decedent's widow, in accordance with the conditions of the will. But there was evidence tending to prove that he intended to comply with the conditions; that he was ready, and offered to render such provision and maintenance; but that she declined the acceptance of his offer, telling him that she wished to manage her own property—desired to maintain herself—and that, in doing so, she would not require his aid. From the whole evidence, though it was, to some extent, conflicting, the jury were, in our opinion, authorized to find an offer of performance on his part, which she declined accepting; and further, on her part, that she waived the performance of the conditions of the will, so far as they related to her support and maintenance.

The evidence being closed, the Court thus instructed the jury: "The will requires *Phineas Cassidy* to furnish *Sarah McCray* with food, raiment, and all other necessary things suitable to her age, during her natural life. And if you believe from the evidence that he performed all these requirements, or offered, in good faith, to perform them, and she released him from such performance, and preferred to take charge of the estate left her by her deceased husband, and live with her son, *John McCray*, and never afterwards called upon *Phineas Cassidy* to perform the conditions of the will, you may find for the defendant."

In reference to this instruction, it is insisted that *Sarah McCray* had no power to release *Phineas Cassidy* from the performance of many of the conditions of the will. We think otherwise. The condition for her support, &c., was evidently intended for her exclusive benefit. Hence, the release, or waiver of the performance of it, could affect the interest of no one save herself. It seems to follow that

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she had a perfect right to waive or release the performance of that condition; and having done so, the case stands as it would have stood, had she been provided for and maintained in the mode pointed out in the will.

Various errors relative to instructions refused, and the charge given, are assigned upon the record; but they will not be noticed, because, having carefully examined the evidence, we are of opinion that it sustains the verdict.

Per Curiam.—The judgment is affirmed with costs.

J. S. Reid and *S. Heron*, for the appellants.

S. W. Parker and *J. C. McIntosh*, for the appellee.

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Monday,
December 5.

APPEAL from the *Randolph* Court of Common Pleas.

Per Curiam.—The appellants, with others, were prosecuted for an assault and battery upon one *Hunt*. Verdict of guilty, and fine of 5 dollars each against appellants. Motions for a new trial and in arrest, overruled.

There is, in the record, a large mass of testimony; but as the bill of exceptions does not profess to contain all the evidence given on the trial, several of the errors (which might otherwise have been important), assigned upon the record, cannot, therefore, be considered.

Upon the errors that we can notice, the first question is, upon the sufficiency of the information. It is said that it should contain a specific allegation that the prosecution is carried on in the name of the state, and that it should conclude with the words "contrary to the form of the statute."

The first branch of the objection is answered by the decision in the case of *Cronkhite v. The State*, 11 Ind. R. 307; and the second, by the provision of the statute, 2 R. S. p. 368, § 61.

The judgment is affirmed with costs.

J. Smith and *J. Brown*, for the appellants.

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1859.GAGE *v.* WOODRUFF and Another.MEIKEL
v.
FURST.APPEAL from the *Lagrange* Court of Common Pleas.

Per Curiam.—The appellees, who were the plaintiffs, sued *Gage* upon two promissory notes, one for the payment of 66 dollars, and the other for 324 dollars, 80 cents. *Monday, December 5.*

The complaint concludes thus: "That the same remain due and unpaid. Plaintiff, therefore, demands judgment for 800 dollars."

The record shows that at the *February* term, 1858, of said Court, the defendant having been duly served with process, was called, and, failing to appear, was regularly defaulted, and judgment accordingly rendered against him for 389 dollars, 89 cents.

The error assigned upon the record, and relied on in the appellant's brief, is, "that the plaintiffs do not, in their complaint, demand judgment for any given sum."

This is a mistake. The complaint, as we have seen, demands judgment for 800 dollars.

The judgment is affirmed with 10 per cent. damages and costs.

J. M. Flagg, for the appellant.

R. Parrett, for the appellees.

MEIKEL *v.* FURST.APPEAL from the *Marion* Court of Common Pleas.*Monday, December 5.*

Per Curiam.—In this case, there is no bill of exceptions, no evidence in the record, no motion for a new trial, nor any exception, in any form, to the rulings of the Court below. The case is, therefore, not properly before us.

The judgment is affirmed with 10 per cent. damages and costs.

R. L. Walpole and *K. Ferguson*, for the appellant.

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v.
McQUIGG.

Monday,
December 5.

APPEAL from the *Gibson* Court of Common Pleas.
Per Curiam.—Suit to set aside the final settlement of
an administrator, for fraud.

Demurrer to the complaint sustained, and the suit dismissed.

The suit was by creditors of the deceased intestate.

The fraud charged was in returning a false inventory.

Those who colluded with the administrator in returning the false inventory, and reaped the advantage of it, and the use of the property omitted to be inventoried, were made parties. See *Roy v. Haviland*, 12 Ind. R. 364.

The code authorizes a final settlement to be set aside for fraud, on the application of any one interested. 2 R. S. p. 275, § 116. We think fraud in the inventory may affect the final settlement with fraud, and will cause it to be set aside.

The judgment is reversed with costs. Cause remanded, &c.

C. Baker, for the appellants.

J. G. Jones and *J. E. Blythe*, for the appellees.

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139 40

McQUIGG *v.* McQUIGG.

The policy of our law is against disturbing divorces granted.

The common-law right to set aside a judgment of a superior Court by bill in chancery, for fraud, or by complaint in the nature of such a bill, was entirely superseded by the various provisions of our code for the vacation of judgments. The statutory mode must be resorted to.

Thus, judgments of divorce can only be set aside upon a motion for a new trial, made within the time allowed therefor.

Tuesday,
December 6.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—In *January*, 1854, *Edmund H. McQuigg*

filed his complaint in the *Marion* Circuit Court, praying a divorce from his wife, *Eliza Jane McQuigg*.

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On affidavit of non-residence, notice was given by publication. In *May* following, the divorce was granted.

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In *August*, 1857, said *Eliza Jane* filed her complaint in said *Marion* Circuit Court, praying that the judgment of divorce be vacated, set aside, and held for naught, on the ground of fraud in obtaining it. Trial, and judgment vacating the judgment of divorce.

The code provides as follows:

“Sec. 43. Parties against whom a judgment has been rendered without other notice than the publication in the newspaper herein required, except in cases of divorce, may, at any time within five years after the rendition of the judgment, have the same opened, and be allowed to defend.

“Sec. 44. But before any judgment shall be opened, such party shall give notice to the original complainant, or his heirs, devisees, executors, or administrators, of his intention to make application to have the judgment opened, as the Court, in term, or the judge thereof, in vacation, shall require; and shall file a full answer to the original complaint, and an affidavit stating that during the pendency of the action, he received no actual notice thereof, in time to appear in Court and object to the judgment, and shall also pay all such costs of the action as the Court shall direct.” 2 R. S. p. 37.

The code further provides that “no complaint shall be filed for a review of a judgment of divorce.” 2 R. S. p. 165, § 586.

The statute of 1859, on the subject of divorce, contains a like provision. Acts of 1859, p. 109.

This Court held that judgments of divorce could not be set aside under the code of 1843. *McJunkin v. McJunkin*, 3 Ind. R. 30.

The policy of our state seems to have been, and to still be, against disturbing divorces granted. This has been induced by a consideration of the consequences necessarily incident to an opposite policy. This case affords an

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illustration. Within the three years between the granting of the divorce, and the setting of it aside, *Edmund H. McQuigg* had married another woman.

In *Woolley v. Woolley*, 12 Ind. R. 663, a doubt was expressed whether the common-law right to set aside a judgment of a superior Court by bill in chancery for fraud, or by a complaint in the nature of such a bill, had not been superseded entirely by the various provisions enacted into our code of practice, under which judgments may be vacated. Further reflection has confirmed us in the opinion that such is the fact, and that the statutory modes must be resorted to.

This being the case, it follows that judgments of divorce can only be set aside upon a motion for a new trial, made within the time allowed therefor, and that the suit in the case now before us cannot be maintained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. D. and R. L. Walpole and K. Ferguson, for the appellant (1).

L. Barbour and J. D. Howland, for the appellee (2).

(1) Counsel for the appellant argued, in substance, as follows:

The question which comes up upon the overruling of the demurrer, the motion for new trial, the motion in arrest, and the motion for judgment in appellant's favor, may be stated thus: 'Has the Circuit Court the power to set aside and annul a judgment of divorce previously pronounced and entered, where that Court had jurisdiction of the subject-matter, and the parties before it, in a manner prescribed by law? if so, can it be done in the manner sought by the proceedings in the case at bar?

The subject-matter of the case—the judgment in which is sought to be set aside—was, as this Court will see, a proceeding in divorce for statutory causes, of which the Circuit Courts of this state have jurisdiction. Then, had the Circuit Court jurisdiction of the person of the complainant and defendant, in that proceeding before it, in the manner required and authorized by law, without saying anything in reference to the presumption on the point of jurisdiction, as evidenced by the finding and decree of the Court, sought to be set aside by this proceeding.

We maintain, that under our statute, the question of the residence of every applicant for divorce is, so to speak, a condition precedent to the judgment granting a divorce, of which fact the Circuit Court must be satisfied, and is necessarily compelled to pass upon, in every application for divorce, before the granting thereof. 2 R. S. p. 234, § 6. If, then, this view be right, we suggest that the Circuit Court could not open the question of whether the applicant

was a *bona fide* resident, when his complaint was filed and judgment of divorce granted; particularly could it not do so in the direct manner sought by the proceedings in the Court below; for if the question of residence of the applicant was involved in the suit for divorce, and the Circuit Court was necessarily compelled to and did pass on the question of the residence of the applicant, before giving the judgment of divorce, then we submit that it follows that the Circuit Court could not again inquire into the question, as was done in the proceedings in this case. The question of residence of the applicant, like the causes for divorce, had to be proved on the trial, to the satisfaction of the Court, and the judgment in divorce for the applicant, is evidence that proof of residence was made; and we submit, where the question of residence was involved in and necessarily passed upon by the Court, as it must be in every application for divorce, whether it is not conclusive between the parties. That this question of residence of the applicant was before the Circuit Court at the granting and giving of the judgment of divorce, is evidenced by the affidavit of the applicant, and the action of the Court. Then the Court was satisfied, when giving the judgment of divorce, from the evidence in the case, of its jurisdiction of the person of the appellant, and the subject-matter of his complaint. Now was the appellee in Court? The judgment recites that proof had been duly made to the Court that the appellee was notified by publication for more than thirty days before the first day of term, &c.; and the evidence showed that the appellee was notified as required by statute, for more than thirty days before the first day of the term of the Court at which the judgment of divorce was given.

The Court having then passed on the question of the jurisdiction of the parties, having the question before it, and having jurisdiction of the subject-matter of the action and the parties to the action in Court, by notice as by law required, we submit whether it is in the power of the Court to review the the same questions, as sought by the proceedings in this case. That the legislature of *Indiana* intended to close the door against the review of judgments of divorce, we think is evident. 2 R. S. p. 165, § 586. This section, prohibiting, as it does in terms, the filing of a complaint to review a judgment of divorce, needs no construction. It means what by its terms it says, or it means nothing.

That such was the intention of the legislature, is manifest from the fact that they made it the duty of the prosecuting attorney of every circuit, where a petition for divorce remained undefended, to appear and resist such petition. 2 R. S. p. 238, § 27. Here we think that by the several provisions of the statute referred to, the legislature intended that when a judgment of divorce was once rendered, no complaint to review that judgment should be filed. Whether this provision of the statute is wise, enlightened legislation, is a matter we are not called upon to discuss. It is sufficient for us to know that such is the act of our legislature.

Many good reasons might be assigned in support of the action of the legislature in prohibiting the review of judgments for divorce; such as the protection of subsequent marriages of divorcees, and consequences following the setting aside judgments of divorce where this relation exists. The case at bar is in point. Here, some two years after the judgment of divorce was granted, the record shows the appellant married again. We think the legislature intended by our statute to prohibit such consequences. Why should the legis-

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lature have so provided, if the intention was not such as we suggest? There was nothing prohibiting the review of decrees of divorce prior to the statute referred to. Decrees of divorce, like other decrees of Courts, were the subject of review on the showing of a proper cause; and our legislature has, by the statute referred to, provided for the opening and review of all classes of judgments and decrees except judgments of divorce. Why except this class of cases?

If, then, the suggestion here made is correct, we submit that it follows that the Circuit Court erred in overruling the demurrer, the motion for a new trial, the motion in arrest, and the motion for judgment in appellant's favor.

* * * * *

The next error committed by the Circuit Court, is contained in the Court's charge to the jury. The principal objection is, to the matter contained in the twelfth paragraph of the charge, where the Court tells the jury that they may attach to the affidavit of appellant such weight as they deem it entitled to. Now our statute declares such affidavit shall be *prima facie* evidence of the *bona fide* residence of such applicant. 2 R. S. p. 234, § 6. The charge here assumes that the jury may attach less, if they deem it right, than that which the statute declares. We suggest that the jury should have been told that they could not attach less weight to the affidavit of appellant than that of *prima facie* evidence of residence. The subsequent paragraph of the charge, where the Court say such affidavit is *prima facie* evidence of residence, rendered the charge contradictory in terms, and calculated to mislead the jury as to the weight and effect of the affidavit.

* * * * *

The Court erred in refusing the charge asked for by appellant. In the charge given to the jury, this Court will see that the Circuit Court makes domicil necessary to residence, and so interwoven that residence could not exist without it. The charge asked and refused, assumes that domicil and residence are not so necessarily connected, but that one may be a *bona fide* resident of one place, and may have a domicil in another. On this point, see *Frost v. Dickinson*, 19 Wend. 11. In this case, the Court holds that a person may be a *bona fide* resident of one state and have a domicil in another.

(2) The argument of counsel for the appellee is inserted entire.

The plaintiff in the Court below, who is appellee in this Court, filed her complaint, alleging her marriage with the defendant on the 16th of May, 1839; that they lived together until 1846, when a separation took place; that on the 4th of January, 1844, the defendant filed his petition for a divorce from her, in the Marion Circuit Court, caused a notice of its pendency to be published, and on the 14th of May following obtained a decree of divorce; that the defendant, at the time of filing his petition, was a resident of Tioga county, New York, and was never a *bona fide* resident of Marion county, Indiana, but continued his residence in New York during the pendency of the divorce proceedings, and made a temporary sojourn in Indiana for the sole purpose of obtaining a divorce, and with the intention of returning to New York, so soon as he should succeed; for which reason, she insists, the proceeding was fraudulent, and prays that the decree of divorce may be annulled for fraud.

The defendant was served personally, appeared to the action, and put in a demurrer to the complaint, which was overruled. The cause went to trial

upon an issue of fact, and under special instructions the jury found that the defendant was not a *bona fide* resident of this state when the petition for divorce was filed, nor when the divorce was decreed. Motion for a new trial overruled, and judgment on the verdict, vacating the decree of divorce, as having been obtained through fraud practised by the defendant.

The pleadings and evidence contain a variety of allegations and testimony, which, under the theory of the case assumed by the plaintiff and adopted by the Circuit Court, are immaterial and irrelevant; the only issue submitted to the jury was the residence or non-residence of the defendant. That really is the question in the case. Was *McQuigg*, when he applied for and obtained his divorce, a *bona fide* resident of the state? If he was not, what are the consequences? Do they, or not, affect the judgment of divorce? And how is it affected?

This is really the important question in the cause. It is presented in various forms—upon demurrer to the complaint—upon the trial of the merits—upon motion for new trial—upon motion for judgment *non obstante veredicto*—upon motion in arrest of judgment. It is still the same. We, therefore, propose to encounter, and, if we can, dispose of it at once, leaving the minor questions, of which there are several, to the brief space that becomes their merits.

We assume the position that “fraud will vitiate any, even the most solemn transactions,” and that “when once it is satisfactorily established, it overthrows all their sanctity, and destroys them as proof.” *The United States v. The Amistad*, 15 Pet. 518. This rule is applicable as well to judgments as to any other transactions of a solemn character. Fraud cuts to the very bone, and utterly subverts whatever is built upon it. This being a direct proceeding to assail a judgment for fraud in its procurement, we are not embarrassed by any questions upon the effect of collateral attacks upon fraud. We have met this judgment face to face. We have, as we shall hereafter show to the satisfaction of the Court, fully proved that it is based upon a fraud—a fraud by which, upon a jurisdiction falsely imputed to the Court, the Court was misled and imposed upon; a fraud, therefore, upon the rights of the plaintiff, and upon the tribunals of justice. If this be so, we insist, that in a direct suit to vacate it, the judgment is a nullity. 1 Story’s Eq. Juris., p. 252.—*Bruner v. Manville*, 2 Blackf. 485.—*Platt v. Judson*, 3 id. 235.—1 Madd. Ch. R. 236.—*Reigal v. Wood*, 1 Johns. Ch. 402. “Equity has so great an abhorrence of fraud, that it will set aside its own decrees if founded thereupon.” Vin. Abr. 543. “Although the judgment of a Court of competent jurisdiction, upon the same subject-matter, will, in general, be conclusive between the same parties, yet such a judgment may be impeached on the ground of fraud; for ‘fraud,’ in the language of DE GREY, Ch. J., ‘is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.’ And in a recent case before the House of Lords, it was observed, that the validity of a decree of a Court of competent jurisdiction, upon parties legally before it, may be questioned, on the ground that ‘it was pronounced through fraud, contrivance, or covin of any description, or not, in a real suit, or if pronounced in a real substantial suit, between parties who were really not in contest with each other.’ We may add, that, if a judgment be obtained in a superior Court clandestinely, by abuse of its forms, and by deceiving its officers, the defend-

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ant against whom it is sought to enforce such judgment, may obtain a speedy remedy by applying to have it set aside, and the offender punished by attachment." Broome's Leg. Max. 254.—*Cline v. Murrell*, 9 Ind. R. 516.—Fonbl. Eq. 27, 642.

The statute provides that "divorces may be decreed by the Circuit Courts of this state on petition filed by any person at the time a *bona fide* resident of the county in which the same is filed." 2 R. S. p. 234, § 6.

Our ground is this—that *McQuigg* never was a resident in good faith; that he falsely assumed a color of residence, and thereby imposed upon the Court; that this fraud and want of jurisdiction are things properly open to examination in a suit for that purpose; that a judgment thus procured, in a divorce proceeding, as in any other action, is void, and will be so declared upon proper allegations and proofs.

It is strenuously urged, in every variety of form, that the principle insisted on is not, under our statute, applicable to judgments of divorce. Why not? Can it be conceived that the legislature have ever adopted provisions so subversive of morals as to make a judgment of divorce fraud-proof? Before the Supreme Court can be brought to so melancholy a conclusion, they will require language so explicit as to leave no room for a construction favorable to honor and truth. They will not dishonor public justice by making it the plaything of imposters. What, then, are these provisions so discreditable to the state? We have, under the code, general provisions securing to the citizen all remedies heretofore existing. "The laws and usages of this state relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." And, "all rights of action secured by existing laws, may be prosecuted in the manner provided in this act." 2 R. S. p. 224, §§ 802, 803.

The provisions relied upon by the appellant are to be found in the 2 R. S. pp. 37, 165, §§ 43, 586. The first is in these words: "Parties against whom a judgment has been rendered without other notice than the publication in the newspaper herein required, except in cases of divorce, may, at any time within five years after the rendition of the judgment, have the same opened, and be allowed to defend." The second reads thus: "Any person who is a party to any judgment, or the heirs, devisees, or personal representatives of a deceased party, may file in the Court where such judgment is rendered, a complaint for a review of the proceedings and judgment at any time within three years next after the rendition thereof. Any person under legal disabilities, may file such complaint at any time within three years after the disability is removed. But no complaint shall be filed for a review of a judgment of divorce."

Here are two modes of relief afforded the citizen, each of which is expressly denied in cases of judgments of divorce. One is "opening the judgment;" the other, "a proceeding to review judgments."

The first of these proceedings is in the nature of a new trial, and is analogous to the setting aside a default and permitting the party against whom a judgment has been rendered to put in appearance and plead to the action. It is a privilege, in favor of such a party, almost without restriction. If judgment has been rendered against him, without other notice than the publication in a newspaper, he has five years within which, after notice to the original plaintiff, full answer to the original complaint, and affidavit of the want of ac-

tual notice, the Court, on his motion and payment of costs, will allow him to defend. He must answer, and furnish proofs, if necessary; in short, it is the trial, upon issue joined and the production of proofs, of a cause once adjudged for the want of defense. It is a proceeding which, from its very nature, admits the existence of a valid judgment, and seeks to escape its binding obligation, not by impeaching it for fraud, and denouncing it as void, but by alleging the want of actual notice, as an excuse for not having defended it, and seeking to show that such facts exist as will, on a new trial, produce a different result. It is such a feature as exists in the *New York* code, in cases of constructive notice, when the "defendant may apply to the Court, within one year after he has received notice of the judgment, but not after the expiration of seven years from its rendition, for liberty to defend the action; and the Court may allow him to do so, upon such terms as are just." 1 Monell's Pr. 493.

The review is at the command of either party, upon complaint filed, alleging errors of law appearing in the proceedings or judgment, or material new matter, discovered since the rendition thereof, or for both causes, without leave of Court. Notice is given, issues of law and fact are formed, and judgment rendered affirming, or reversing, or suitably modifying the original judgment. This provision, made since the blending of law and chancery proceedings into one system, is designed to take the place of the bill of review, and a bill for a new trial, in actions at law. "A bill of review may be had upon apparent error in judgment, appearing on the face of the decree; or by special leave of the Court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed." 3 Blacks. Comm. 454.—Story's Eq. Pl., §§ 403, 412. This in causes in chancery, when the decree had been enrolled. For the law applicable to bills for new trials, see *Doubleday v. Makepeace*, 4 Blackf. 9.

We frankly concede that under these statutes Mrs. *McQuigg*, as the divorced wife of the appellant, could not open the judgment which the *Marion* Circuit Court had rendered against her. With or without actual notice, it was conclusive, and silenced her, whatever her wrongs may have been. So, too, she could not ask a review of the proceeding. If there were errors of law, she had her appeal, and nothing more. If there was newly discovered evidence, no matter how overwhelming it might have been, the law forbade its production. But we argue that her application does not fall within the terms or spirit of either of these inhibitory clauses. She does not seek for a new trial. She does not ask a reversal or modification of the judgment of divorce. She does not, in either of these forms, so far intimate a sentiment of respect for the proceeding, as to give in her adhesion to its validity. She avers that it is an absolute nullity, a creature of falsehood and fraud, having only a colorable existence; and this sham she seeks to expose and explode. Surely there can be no great difficulty in perceiving the distinction that exists between a proceeding which recognizes the validity of a judgment, and seeks to open it for the opportunity of defending the suit, or to review it for the purpose of a new trial, or in hope of reversal for error in law; and a proceeding, denying the validity of a pretended judgment, and seeking to have the record on which it appears, cleared of such rubbish. Here the evidence of fraud is invoked—of fraud as a "collateral, extrinsic act which vitiates the most solemn proceedings of Courts of justice." *Conway v. Beasley*, 3 Hagg. 689.—*Borden v. Fitch*, 15 Johns. 121, 145.

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The legislature may have satisfied themselves that there were peculiar conditions affecting divorced parties, which deserved, to a certain extent, the prudent consideration of the lawgiver. New ties are soon formed, and innocent parties, it may be, involved. It may be very well, in view of these things, that judgments of divorce shall not be opened or reviewed. If the petitioner has acted in good faith, let him go with his divorce. But it would be monstrous to whitewash fraud, to open the Courts to the tricks of dishonest men, and to suffer the officers of the law to be imposed upon and converted into artificers of injustice. In such cases, the legislature took no notice of consequences. It left the party who swindles a Court into a fraudulent judgment of divorce, precisely where he would have been, if acting more boldly, though not more wickedly, he had incurred the penalties of bigamy.

The foregoing discussion removes, we think, the statutory objections, and settles the question that there is not any act of the legislature which places a judgment of divorce, so far as it may be affected by fraud, upon any different ground from other judgments. Is there any difference of principle recognized by the law which secures to this class of judgments an immunity from the consequences of fraud? We think not; and proceed to a brief examination of authorities to support our view. "If a tribunal has been imposed upon, and in consequence of the fraud a judgment of divorce has been wrongfully rendered, it may vacate this judgment, when, upon a summary proceeding, it is made cognizant of the fraud. So the *Pennsylvania* Court, in a recent case, decided upon the strength of the *English* authorities; and further, the order vacating the decree of divorce, was, after the time for appeal had elapsed, conclusive; although a second marriage had been in good faith contracted, and although the vacating order was passed without actual notice to the party in the divorce suit against whom it operated. The authority principally relied upon to sustain this decision was the case of *Prudham v. Phillips*. 'The principle,' observed GIBSON, C. J., 'is a general one, and applicable alike to ecclesiastical sentences and common-law judgments. It has no relation to the doctrine of amendments, which make the record speak a language it did not speak before; the vacation is a new and independent judgment, of which the recorded entry is its appropriate evidence. It may be an arbitrary act to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act, which was operative at the time; and under this first impression I would have decided as did the judge at nisi prius. But the legitimate husband has his rights; and if any one must suffer from the invalid marriage, it is he who procured it. By the terms of the contract, he took the lady for better or worse; and having assumed at least her moral responsibilities, he stands as to hardships in her place. He, therefore, has no right to complain.'" Bish. on Mar. and Div., §§ 699, 700, 706, 707.

Mansfield v. Mansfield, 26 Mo. R. 163, is a case in point. "The only ground upon which a judgment in this case is sought to be reversed, is the 14th section of the act concerning divorce and alimony, in the Revised Code of 1855. That section provides that no petition for review shall be allowed, of any judgment for divorce rendered in any case arising under this act, any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in

other cases. This statute did not go into effect until *May*, 1856. This suit for divorce was commenced in *April*, 1855. The provision is only applicable to proceedings commenced under the act, and consequently has no application to this case. To what extent the legislature designed to close the doors of Courts of justice to parties to divorce suits by this enactment—whether the grossest frauds perpetrated in *ex parte* proceedings must be understood as perpetrated upon the record, without any power in Courts to give redress—is a question which may hereafter become important. This Court has no power or wish to anticipate a decision on this question, nor have I individually any desire to put forward any suggestions of my own. It occurred to me, however, that the facts in this case named furnish a strong commentary upon a very rigid and literal construction of the 14th section above referred to. I state them merely as they stand admitted on the record by demurrer. The plaintiff persuaded his wife to pay a visit to her mother, in *Illinois*, representing to her that her health, which was delicate, would be very much improved by such a trip. No sooner had she started than he institutes a suit for divorce, upon the indefinite charge of personal indignities, consisting of abusive and threatening language. Representing her to be a non-resident, he procures an order for publication, and at the first term of the Court, upon proof, as the record states, that he was an injured party, he gets a divorce. In the meantime, he had kept up an affectionate correspondence with his wife, couched in the most loving terms, and had also invited her and persuaded her to remain in *Illinois*, upon assurances that he designed moving there, and that her return to *Missouri* would be an unnecessary and expensive journey. The wife finally returns to this state, and for the first time learns that she is no longer a wife; that she and her children are thrown upon the world without any allowance, and with charges against her reputation and character, of which she never heard before. She comes into Court within the period allowed by law, as it stood before 1856, and as it still remains in all other cases, and asks to be heard in her defense, declaring the utter futility of the charges, and stating her ignorance of the whole proceeding from first to last. To this petition the plaintiff demurred, and the Court overruled the demurrer. The plaintiff then took a non-suit. Of course, one could have but one opinion of the merits of this case. Did the statute of 1855 intend that *ex parte* decrees in divorce cases, obtained by fraud, should never be disturbed or looked into? If the provisions were limited to cases where a second marriage intervenes, a motive for such an enactment could be perceived; but when no new ties have been formed, why put judgments in these cases on any other footing than all other judgments, where they have been brought about by fraud?"

In this case, it will be observed that the Court saved it from the operation of a statute like ours, forbidding the review of judgments of divorce. It will appear, also, that it was an original petition, attacking the judgment and tendering proof. It is further obvious that the Court had jurisdiction of the subject-matter—the *status* of the parties—as there could have been no question of domicil. In this particular it is a much weaker case than the one before the Court, where, by a fraud upon the law, jurisdiction has been unconsciously usurped by the Court. And in this case, the judge, dwelling at length upon the circumstances of fraud, and doubting even the application of the statute denying a review, is so much preoccupied with the point, that the case is saved by reason of the date at which the restrictive clause was adopted, that he does

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not see the natural distinction between reviewing a judgment for error in law, or newly discovered evidence, and impeaching it directly for fraud. It is fair to assume, if his way had not been opened by this question of dates, he would have soon disembarrassed himself by cutting through the bark of his case.

Smith v. Smith, 4 Iowa R. 266, illustrates the view we take of this case:

"On the 19th day of *January*, 1854, a writ of error *coram nobis* was issued, on the application of *Rosetta Smith*, returnable to the *March* term of the District Court of *Dubuque* county, in the case, when the parties appeared for hearing thereon, with testimony to establish the grounds of merit. The respondent, *Rosetta L. Smith*, by her counsel, moved the Court to set aside the decree of divorce granted at the last term of the Court, on the complaint of her husband, *Asabel L. Smith*, against her, for reasons in her application on file; and further protested against said proceeding:

"1. Want of jurisdiction in the Court.

"2. The want of sufficient notice that should be legally binding on her. And she protested against the proceeding generally.

"After argument had, the Court decided that it did not possess jurisdiction of the case; but also set aside the decree of divorce, entered at the previous term, and allowed the defendant to come in and file her answer, and make defense to the petition. * * * *

"The third assignment of error is also well taken. Section 1480 of the code, makes the residence of the plaintiff within the county, an indispensable requisite to give the District Court jurisdiction, in all cases of divorce and alimony. Such residence must be *bona fide*.

"A mere temporary sojourn for a season, *in transitu*, without intent of domiciliation and citizenship, is not what we understand by the residence contemplated by the legislature. It certainly could not have been intended by the legislature that a malcontent of marriage contract, wishing to be free from its sacred obligations, should be permitted, in a clandestine manner, to leave his family and home in another state, where the law would have enabled him to adjust his rights, and redress his grievances, if any existed; where the parties to such proceeding both resided and could be fairly and fully heard; where the acts of the complaint, if any, all transpired, and the testimony could be most conveniently procured; and come to this state for the sole and specific purpose of remaining here six months to set up a residence, that he might procure a divorce and then return.

"Such preliminary changes of venue, at the option of a party to the marriage contract, we opine, cannot be sustained by either the letter or spirit of our code. To give such effect to it, would be judicial condemnation of the wisdom and morality of legislation. The evidence of the case establishes the fact, by the statement of the plaintiff, that he had been advised by an attorney that he could procure a divorce more easily in *Iowa* than in any other state, and that he had been staying in *Dubuque* long enough for that purpose, and no other; that he was on his return to the state of *New York*, and would never live with his wife again. In the case of *Hunt v. Hunt*, decided at this term, we have expressed our unwillingness to add to statutory facility, that of loose judicial construction, to aid in the procurement of divorces from the marriage contract. Upon the most deliberate consideration of the subject, we reiterate what we expressed in that case. The family relation lies at the foundation of society. Upon it rests the well being and hopes of the community. In its

rights, duties, and responsibilities, are involved the dearest interests of the state. The law, by enactment and due administration, should cherish and guard it with sacred fidelity. Otherwise, instead of being the legitimate means of individual and general happiness and prosperity, it will be perverted, and become the fruitful source of misery and ruin. It is the duty of our judicial tribunals to expound faithfully the enactments of the legislature, and give them due effect by legal execution. This we will do; but in the absence of legislative provisions requiring it of us, we are not ambitious to establish for *Iowa*, by judicial construction, the humbling distinction of being the state in which a divorce can be most easily obtained! The effect would be to make our young state the receptacle of those who are regardless of domestic and social virtue, and her laws the instrument of wrong, by depriving the innocent and unsuspecting of their rights.

"We are of the opinion that the plaintiff had not acquired such a residence as is required by the code; that, therefore, the District Court could not exercise jurisdiction in the case, and the complaint must be dismissed. Decree reversed."

The case of *Allen v. McClellan*, 12 Penn. R. 328, is a leading case, the opinion having been given by the late Chief Justice GIBSON. This case has been improperly remarked upon as a case not between the divorced parties, but a case between the one who procured the fraudulent divorce and a stranger. This is true, to some extent, for it was an action upon a note, indorsed by the second husband of the divorced woman to a third person. This, however, does not, in the slightest degree, affect the case as one in point; for the proceeding to set aside the divorce was at the instance of the injured husband, and was the gravamen of the case cited, and, indeed, is passed upon and decided by the Supreme Court precisely as if an appeal had been taken from the vacating order. The facts are, that "in 1845, a libel for a divorce was filed by *Lucretia Bleeker*, in the Court of Common Pleas of *Philadelphia*, alleging desertion and cruel treatment. The record showed that a copy of the interrogatories to be propounded to witnesses, and the notice of taking the testimony, was posted in the prothonotary's office ten days before the examination of the witnesses. The evidence was taken and returned, and a decree of divorce entered *November 22, 1845*. A certified copy of this decree was exhibited to *Wheatley*," the man with whom the second marriage was contracted, "by the father of the libellant, upon the faith of which, *Wheatley* married her, on the 12th of *January, 1846*. On the 13th of *February, 1846*, *Bleeker* applied to the Court to revoke and rescind the decree of divorce."

The application denied the truth of the libel, and charged the libellant with adultery. Notice was left at the reputed residence of the libellant, but it was shown to the Court that she was absent from the state. On the 7th of *March* this decree was entered:

"Ordered that the proceedings and decree in this case be annulled, on the ground that the same was obtained by fraud and imposition on the Court."

The record did not show any appearance of the libellant, nor the production of any evidence. It appeared that Mrs. *Wheatley* had no issue by *Bleeker*, but that by her second husband she had issue, a child born *November 4, 1846*.

This is direct enough. It was a summary proceeding by the husband to vacate the divorce, on the ground of falsehood and adultery. In this particular, it is by no means so strong a case as the one we are discussing. The

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Court says it was imposed upon. How? By means of a false libel, preferred against an innocent man, by a woman who was herself an adulteress. This is giving the case its utmost color, supposing the proofs were equivalent to the allegations. It is not insisted that there was a want of jurisdiction, and that the Court was imposed upon to the degree of assuming powers beyond the law. The opinion of GIBSON, C. J., goes directly to the point that a Court, when imposed upon, and induced to render a judgment through fraud, may, in a summary proceeding, at a subsequent term, vacate the judgment so obtained. The importance and interest of the case induce us to present it in full in a note at the end of this brief. See note A.

We have so far considered this case upon principle and authority, chiefly from the stand-point of fraud. We complain of it because the proceeding is tainted with this poisonous ingredient; because through the forms of law a false judgment has been recorded; not merely because of an injury to private rights, but because the Courts by such acts are prostituted to wicked uses, and public justice degraded by the imposition which foists an illegal jurisdiction upon them. But there is another ground of which we must not lose sight; and that is this want of jurisdiction, which makes the case, from the beginning to the end, *coram non judice*. It is under certain conditions that the legislature gives the Circuit Courts the power to entertain jurisdiction of the subject-matter. That subject-matter is the *status*, the relation, of the parties. We do not pretend to question the power of our Courts to grant divorces for causes arising beyond our territorial limits; but we do insist that when any power of control over a relation so important to the safety and good morals of society as marriage is assumed, the statutory conditions upon which alone that power arises shall be respected. A "petition" may be "filed by any person at the time a *bona fide* resident of the county." Upon such petitions "divorces may be decreed by the Circuit Courts of this state." Now, this provision is not for the purpose of giving a personal jurisdiction; it is for the purpose, when the petitioner is a resident in good faith, of conferring a right upon him, and giving the Court jurisdiction over the subject-matter of the controversy, the marriage relation, without any regard to the domicil of the other party. If, then, the petitioner be not a resident of the county when he presents his petition, the Court has no jurisdiction whatever to entertain it, and every step taken in the cause, whether with or without the appearance, or with or without the consent of the adverse party, is void.

It is sufficient here to refer generally to the various decisions upon this subject in our own Supreme Court.

"The judgment of a Court in a suit requiring ordinary adversary proceedings, which appears on its face, or may be shown by evidence (in a case where, by the rules of evidence, it may be shown,) to have been rendered without jurisdiction having been acquired by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be so treated when it comes in question collaterally." Perk. Dig. 539, and cases there cited.

Freeman v. Freeman, 1 Mich. R. 480, is an appeal from chancery: "A petition for divorce was filed against a non-resident defendant, under R. S. 1838, and the following order made for the appearance of the defendant: 'It satisfactorily appearing that the defendant, *Rebecca Freeman*, is not a resident of this state, but that she resides in the city of *New York*, on motion of the plaintiff, it is ordered that said defendant cause her appearance in this cause to be

entered within four months from the date of this order, and that, in case of her appearance, she cause her answer to said petition to be filed, and a copy thereof served on the petitioner's solicitors, within forty days after service of a copy of said petition, and a notice of this rule, and in default thereof the petition will be taken as confessed. And it is further ordered, that within twenty days the petitioner cause a copy of this order to be published in the state paper, and that said publication be continued in said paper at least once a week, for eight weeks in succession, or that he cause a copy of this order to be served personally on the defendant, at least twenty days before the time provided for her appearance.'

"The order was published. The defendant did not appear. Testimony was heard and a divorce decreed. The Court held that under the statute the order should have included a notice of the nature of the petition. That as it did not, in that respect, comply with the statute, the decree was wholly void for want of jurisdiction in the Court."

This divorce was a nullity, not for any fraud; not for any imposition on the part of the plaintiff upon the officers of justice; not for the want of jurisdiction over the subject-matter; but because jurisdiction over the person of the defendant could only be acquired by apprising her of the nature of the petition, and this prerequisite had been omitted. How much more clear is it that such a judgment is a nullity, when the Court rendering it has no jurisdiction over the subject-matter.

In *Thompson v. The State*, 28 Ala. R. 12, the Court, after noticing cases referred to in argument, proceed—"All of the above citations, except one, are of *New York* and *Massachusetts* decisions. In none of the *New York* or *Massachusetts* cases was the decree for divorce in another state held void upon the exclusive ground of a want of notice and jurisdiction of the person of the defendant. In all of them there was fraud in the procurement of the divorce, and absence of a *bona fide* residence in the state where the divorce was granted, and most of the decisions are based on these grounds alone. We do not controvert the authority of those decisions, so far as they assert that fraud in the procurement of a divorce, or want of *bona fide* residence of the person obtaining it in the state where it was granted, would render the decree null and void. Thus far they are sustained by reason and the other authorities. * * * * If the defendant did not go to *Arkansas* *animo manendi*, or if he went to that state merely for the purpose of obtaining a divorce, and intending to remain no longer than was necessary to accomplish his purpose, or if the divorce was procured by fraud, the decree of the *Arkansas* Court would be void, and the appellant, in marrying again in this state, while his former wife was living, would commit the crime of polygamy." See, also, *Hinds v. Hinds*, 1 Clarke (Iowa R.), 36; *Shonwald v. Shonwald*, 2 Jones Eq. (N. C.) 366.

"When parties resort to the Courts of a foreign state or country, without a change of domicil, for the purpose of obtaining a divorce to which they would not be entitled by the law of their own country, the divorce, as we shall hereafter see, will be treated at home as invalid. The true principle is, undoubtedly, that the foreign tribunal had no proper jurisdiction over the subject-matter, being one of *status*, with which the Courts of the parties' domicil are alone competent to deal. Yet this case is sometimes treated as one of fraud." Bish. on Mar. and Div., § 709.—*Jackson v. Jackson*, 1 Johns. 424.

And the general doctrine is laid down by the same writer, at § 721: "The

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tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has an actual, *bona fide* domicil within its territory."

The authorities supporting this principle are clear and abundant. The point has been repeatedly decided in *New York*. *Bradshaw v. Heath*, 13 Wend. 407.* The same is true of *Massachusetts*. *Barber v. Root*, 10 Mass. R. 260. In the latter case, the judge uses this language: "The laws of *Vermont*, which authorize the Supreme Court of that state to proceed in suits for divorce instituted in favor of persons resident for a time, but having no settled domicil within the state, against persons resident and domiciled in other states; * * * in short, where no jurisdiction of the subject-matter can be suggested or supposed—are not to be justified by any principles of comity which have been known to prevail in the intercourse of civilized states. I must be permitted to say the operation of this assumed and extraordinary jurisdiction is an annoyance to the neighboring states, injurious to the morals and habits of the people, and the exercise of it is, for these reasons, to be reprobated in the strongest terms, and to be counteracted by legislative provisions of the offended states."

We respectfully submit that upon statutory grounds, and upon a series of decisions remarkable for uniformity, it is unquestionable law, that without the petitioner has a domicil established in good faith in this state, the marriage relation which he seeks to have dissolved, is a thing not subject to the laws of *Indiana*, and beyond the jurisdiction of the Court; and that a decree of divorce pronounced under such circumstances, is void. And that, when a fraud is committed by a pretended residence, it is not merely a fraud *inter partes*, but it is a fraud upon the law, an imposition upon the ministers of the law, and such a perversion of justice, as gives the cause somewhat of a public character, when an effort is made to overthrow the fraudulent judgment.

Touching the residence, the character of the evidence will appear from the following abstract:

Alvah B. Archibald, brother-in-law.—Defendant went to *Indiana* in the fall of 1853. Witness had charge of house and business. Defendant returned *March* following. Thinks he made visit back during the interval. Left his household furniture behind. Witness surrendered the business on his return. *Mrs. Archibald* went there *April*, 1852. Witness, fall following. Remained till 1854—had no charge of business until fall of 1853. Defendant said he had examined the laws of several states—divorces were easier in *Indiana* than in any other. Said he was going to *Indiana*. On his return, in the spring, went to *Kansas*, and in 1855 to *Flint*. Kept house a year at *Elmira*, after his return from *Indiana*. In his letters, spoke of when he expected to be at home. Gave directions about business, and wrote for money. Just before going to *Indiana*, ceased to talk of various places in the west as good business points. Said *New York* was the worst place in which to obtain a divorce—*Indiana* was the easiest—six months' residence, and proof of his wife's absence was enough.

*This doctrine is asserted in a late case, by DAVIES, J., in the Supreme Court of *New York*. We cite it, not to indorse it throughout, but as sustaining the principle contended for. See at the end of this brief, Note B., from report in the *Daily Times* newspaper.

Mary Talcott, defendant's cousin.—Said he was going to *Indiana* to get a divorce. One year's residence necessary. Must have a divorce. Could not get one in *New York*—could not find a cause of divorce in *New York*. Substance of frequent conversations, that he was going to *Indiana* to get a divorce. Spoke of nothing else as his object. This was between his first and second trip west.

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Charlotte Brown.—Said he was going to *Indiana* to get a divorce. Could get one easier and cheaper there. Resumed his business when he came back. The laws, he said, were best in *Indiana*. Am sure he told me he went west to see what the laws were. When he returned, said he had sold out. That *Indianapolis* was on old *Dutch* place—too many old *Dutch* fogies there.

Margaret Falkner.—Said he was going west to get a divorce. Took charge of his business on his return.

N. W. Davis.—Said he was getting a divorce in *Indiana*.

Jesse McQuigg.—Is brother of the defendant. Said he was going to *Indiana* to get a divorce. Because he could not get one in *New York*. This was after he had been to *Indiana*. Left his children in *New York*. In *New York*, separation was not sufficient. Said he had got a divorce. Talked this to any one. Came back in the spring, and then went away to get married. Did not then get married, as there was some fear about the divorce. Said he must go into business in *Indiana*, to enable him to get a divorce.

Mary E. McQuigg, daughter of defendant.—The defendant resided in *Barton*, *Tioga* county, *New York*—had resided there ever since witness can remember. He went from home west, in the spring of 1853—was absent some eight or ten days. Said he went to *Indianapolis*. After his return, he remained in *Tioga* county until *November*, 1853. Carried on his usual business on the farm, during 1853, till *November*. He then said he was going to *Indianapolis*, and stated he would be gone nearly all winter. He returned to *Tioga* county in *March*, 1854. During the winter, he wrote several letters, saying he would be home in *April*—but he came back in *March*. After his return, in *March*, he remained until *September*, 1854. He then removed his furniture and family to *Elmira*, *Chemung* county, *New York*, and said that place would probably be our home. We were there about one year, when he went away, leaving myself and sister at school. He took no visible property, nor any member of his family. Said he would be gone but a little while—he had some little business there. This was when he went to *Indianapolis*. Defendant carried on farming in *New York*—the lumber business in *Michigan*. Never heard of him being in the candle making business in either of those states. I have heard him say that he did not like *Indianapolis*—that it was not a very pleasant place.

Descitt D. Duryea.—Knows defendant started for *Indiana* in *July*, 1853, and returned in *September*. Told witness, before he started, that he was going west to obtain a divorce. After coming back, in *September*, he remained in *Barton* until *November*, and then returned to *Indiana*, and remained there until about the 15th or 20th of *March*, 1854. On his return, myself and brother purchased his farm. He remained in *Barton* until about the 10th of *April*, and then was back and forth from *Barton* to *Owego*, until some time in *May* or *June*, when he started for *Nebraska*. On his return from *Nebraska*, he removed his furniture to *Elmira*, and lived there until some time in the spring of 1855, when he removed to *Michigan*. When he returned from *Indiana*, in the spring of 1854, he told me he had not got through with the business between himself

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and his wife. I received a letter from him, in 1854, in *February*. When he left, he placed his farm and business in the hands of *Alvah Archibald*, and took it into his own hands. His household furniture remained in the house, on the farm, until *August*, 1854. On his return, in *March*, 1854, I asked him how he liked the country, and he said, not well enough to go there to farm it.

William Bensley.—Defendant resided in the town of *Barton*, *Tioga* county, up to 1854, and moved to *Elmira*, in 1854; resided there about one year. Then moved to the state of *Michigan*. In 1853, in *November*, he went west. He told witness, about the time he left here, in 1853, that he was going to *Indiana* to get a divorce. He had previously told me that he thought of going to *Pennsylvania*, but he would have to stay there too long to gain a residence; it would take a year to gain a residence. He returned from *Indiana* in *March*, 1854. Soon after he returned, he told me he had got a divorce. Resumed his business here. Remained here, at *Barton*, and in this vicinity, till the fall of 1854, then moved to *Elmira*. In *May* or *June* of 1854, he was absent about three weeks, and told me he had been to *Nebraska*, with Judge *Avery*.

Owen Cullins.—Defendant said he came west to see what prospect there was for business in the west. If he could suit himself in the west, he would sell out in the east and come west. Talked of the lumber business. Said he had a farm in the east, and his family was there. Put up a candle factory.

Judge Avery, for defense.—We started from *New York* together, say in *April* or *May*, 1854. We came by *Indianapolis*, and he was to go to *Nebraska* with me. I loaned him money to bear his expenses. Can't tell how long we remained in *Indianapolis*—several days. Didn't come here to have *McQuigg* get his divorce. The case was tried here. I was in Court when it was tried. *McQuigg* put up at a hotel, and stayed there till we went to *Nebraska*. In the fall of 1854, he was in *Michigan*, and in 1855, removed to and became a permanent resident there.

Mr. Gulick.—Don't know when *McQuigg* left *Indianapolis*, in 1854. We had some negotiations for sale of the factory to me, in summer of 1854, about the time he started to *Kansas* or *Nebraska*.

We have presented this summary to show the ground upon which the jury proceeded, in finding that the appellant had never any residence in this state. We shall go into no discussion upon the evidence. We ask for it merely an examination, particularly of that of Mr. and Mrs. *Waldo*, witnesses for the defense. We are very sure there can be no doubt that *McQuigg* had, at no time, a residence in this state.

We propose to notice, as far as may be necessary, the other points presented in the record. The errors assigned, are the following: 1st, overruling the demurrer to the complaint; 2d, overruling the motion for a new trial; 3d, overruling the motion in arrest of judgment; 4th, overruling the motion for judgment in favor of the defendant *non obstante veredicto*; 5th, rendering the judgment which was rendered. So far as these points are concerned, we have nothing further to urge.

There are various exceptions taken, in the course of the proceeding, by the defendant's counsel, which are not assigned for error. We, therefore, ask the special attention of the Court to the assignment of errors. Those not already enumerated, are: 6th, overruling motion for a bond for costs; 7th, overruling motion to suppress the depositions of *Mary E. McQuigg*, *Charlotte Brown*, *Warren Bensley*, *M. H. Hollensbeck*, *Margaret Falkner*, *N. W. Davis*, and

Eliza W. Farnham; 8th, the refusal to give the charge asked by the defendant; 9th, the giving of the 4th, 8th, and 9th charges given by the Court. Of these, briefly, in their order.

As to the bond for costs: We insist that the Court decided properly that, in this case, no bond for costs should be required. The divorce proceeding admits that the plaintiff had been the wife of the defendant. She comes forward in this suit, and proposes to prove that the judgment of divorce was procured by fraud; that the Court was imposed upon by a false pretense of residence, and that no jurisdiction over the cause ever existed. Upon the double view that it was a divorced wife seeking to annul the judgment of divorce, and that it was, in some degree, a public proceeding to vindicate the purity of the Court, it was ruled that no bond could be required. Further, there was prayed a change of venue, by the defendant, which was granted, and a judgment for the costs against him up to that time. It afterwards appears in the record, that the cause had been followed to *Johnson* county, where it was agreed in writing that it should be ordered back to the *Marion* Circuit Court, to be reinstated on the docket. The motion for costs was not afterwards renewed. And finally, "the merits of the cause have been fairly tried and determined in the Court below." 2 R. S. p. 163.—*Rockhill v. Spraggs*, 9 Ind. R. 30. Under our code, the ruling in *Griggs v. Voorhies*, 7 Blackf. 561, could not have been made. The spirit of the decision in *Culley v. Laybrook*, 8 Ind. R. 285, is in harmony with this view.

As to the depositions: The assignment of errors complains of the refusal to suppress one entire deposition, that of *Mary E. McQuigg*. This witness was examined under an order of the Circuit Court. 2 R. S. p. 86, § 249. There was no motion made for a continuance, on the ground that the deposition was not filed in time. 2 R. S. p. 88, § 263. The deposition was taken in *December*, 1857; the cause was tried in *January*, 1859. These observations are sufficient to satisfy the Court that the motion to suppress was properly overruled. The assignment further complains of the refusal to suppress the depositions of *Charlotte Brown*, *Warren Bensley*, *Matthias H. Hollensbeck*, and *Nathaniel W. Davis*. It is difficult to understand precisely what depositions are meant by the counsel. There are on file two depositions of *Davis*. There are also two *Bensleys* whose depositions were read to the jury, *John* and *William*; but there does not appear on the record the deposition of any one named *Warren Bensley*. We infer from the written motion made by the defendant, asking the suppression of depositions, that the design is to assign for error parts of the deposition taken by the plaintiff before *John Ripley*, Esq., at *Owego*, *New York*. The motion is made to suppress "all of *Warner's* deposition, marked B." This is, perhaps, meant to apply to the deposition of *Samuel Warren*. "All of *John Bensley's*, marked C. All of *Matthias Hollensbeck's* deposition, marked D. All of *Margaret Falkner's* deposition, marked E. All of *Nathaniel W. Davis's* deposition, marked F." And the reasons assigned in the motion are, that the depositions are irrelevant to the issue; that the certificate is irregular; and that the commission had expired, from the 7th to the 12th of *October*.

Referring to the deposition, it will appear that the commission is directed to *John Ripley*, Esq., who is authorized, at his office, in *Owego*, *Tioga* county, *New York*, on the 6th day of *October*, 1857, to take depositions on behalf of the plaintiff. The defendant attended every day, and cross-examined; and on the last day, proposed to introduce witnesses on his own behalf. The certifi-

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cate was drawn with great care, and is, in every respect, in conformity with the statute. It has no official seal, but there is nowhere an objection on this ground.

It is alleged in the bill of exceptions, but not in the motion to suppress, that "It does not appear by the depositions, or certificate, that they were taken before any person or officer authorized by law to take and certify depositions." Now this, although somewhat broader language than is used in the motion to suppress, is not an objection for the want of authentication of the official character of the officer. Such authentication is not to be found in the deposition or certificate. How is the Court to say that it does not appear that *Ripley* was not a person authorized to take depositions. Because he is not described as an officer? No official character is required, other than that which arises from his special employment as a commissioner. The common law power of the Courts to appoint commissioners to take depositions, is continued by the statute. 2 R. S. p. 84, § 245.—*Id.* 87, § 260. And it is clear the statute does not mean the class of officers appointed by the governor to take depositions in other states. They are officers, and need no special appointment by the Court, in any case. The statute, moreover, at § 260, last cited, distinguishes between officers and commissioners. The latter are mere creatures of the Court, appointed *pro re nata*. It may be urged that, in this instance, there does not appear, pursuant to § 245, that an appointment was made by the Court. But how does the Supreme Court know that fact? For all that appears, such an appointment may, or may not, have been made. It is very certain that no objection has been made to the deposition, for the want of such an appointment.

The record discloses the fact that a commission was issued by the clerk, directed to Mr. *Ripley*. Section 60 declares that no order of Court shall be necessary. If none is required, the deposition is good. If one is required, no exception for the want of an order of Court, has been taken. So far as the objection goes to the want of relevancy, the defendant has had the full benefit of it; the Court below instructed the jury that there was no point to be considered but the question of the defendant's residence. *Lewis v. Lewis*, 9 Ind. R. 105.

If it can be possible that the motion to suppress was improperly overruled, the objection only goes to that part of the testimony which touched the question of residence. We have sufficiently vindicated the deposition of *Mary E. McQuigg*. That of Mrs. *Farnham* contains nothing upon the subject of residence. There remain, then, the depositions of *Brown*, *Warren*, *Bensley*, *Hollensbeck*, *Falkner* and *Davis*. Leaving their evidence entirely out of the case, it will be found that abundance of testimony remains to support the verdict. If so, no reversal can be had. *Parker v. The State*, 8 Blackf. 293.—*Billingsky v. The State Bank*, 3 Ind. R. 375.

The depositions last named, are but parts of the whole, taken at *Owego*, before Mr. *Ripley*. We suggest that the motion to suppress a part, cannot go to a question affecting the admissibility of the entire deposition. The defendant, confining his attack to the deposition of the witnesses named, admits the regularity of the deposition, so far as the other witnesses named in it are concerned. The regularity of the deposition to this extent is, therefore, conceded; and the instrument if regular for one purpose, is regular for all purposes.

As to the charges given and refused, we shall make no comment upon them.

The instructions of Judge MAJOR were full and clear upon the only point submitted to the jury; the only point to which the jury responded.

We have thus discussed the real and vital question in this controversy, as fully and forcibly as it is in our power to do. The minor questions all yield to the consideration, that it appears from the record the cause has been fully tried and determined upon its merits. We are well aware that there are embarrassing considerations affecting one of the parties, upon which a strong appeal may be made to the Court. We might urge, on the other hand, the cruel injury which the defendant has inflicted on the plaintiff. He has left her to poverty. He has deprived her of her children. He has, by placing her in the position of a woman divorced at the suit of her husband, sought to impair her good name. But we care nothing for the influence of such considerations, as we know the case ought to be decided upon principle. We believe it will be so decided. And the settlement of the case in accordance with principle, will certainly convey a salutary lesson to that large class of discontented or lecherous pilgrims seeking the *Mecca* of divorce, who turn their faces towards *Indiana*, as the happy region where the judgment they wish can be obtained the most easily and the most cheaply. It will secure private rights, by vindicating the purity of public justice.

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Counsel added the following notes to their argument:

NOTE A.—*Allen v. McClellan*, 2 Jones, 12 Penn. St. R. 328.

1. The Court of Common Pleas have the power to vacate a decree of divorce, entered at a previous term, where it was obtained by fraud on the Court, although a marriage had been contracted subsequently, on the faith of such decree, with a party thereto, and issue born.

2. A decree reciting that the former decree was vacated for such causes, is conclusive, after the time for an appeal has elapsed, though there is nothing on the record to show that proof of the fraud was made; and, although it was admitted that, when service of notice of the intended application to vacate was made, at the reputed residence of the libellant, she was out of the state.

Assumpsit on a promissory note, drawn by the defendant at four months, in favor of *Lucretia Bleeker*, dated *December 5th*, 1845. On the 16th day of *January*, 1846, *Wheatley*, for himself, and *Lucretia*, his wife, (late *Bleeker*) indorsed the note to the plaintiff. A case was stated in the nature of a special verdict, and the facts were these:

The payee of the note was married to *Bleeker*, in 1840. In 1845, a libel for a divorce was filed by her in the Court of Common Pleas of *Philadelphia*, alleging desertion and cruel treatment. The record showed that a copy of the interrogatories to be propounded to witnesses, and the notice of taking the testimony, was posted in the prothonotary's office ten days before the examination of witnesses. The evidence was taken and returned, and a decree of divorce entered *November 22*, 1845. A certified copy of this decree was exhibited to *Wheatley*, by the father of the libellant, upon the faith of which *Wheatley* married her, on the 12th of *January*, 1846. On the 13th of *February*, 1846, *Bleeker* applied to the Court to revoke and rescind the decree of divorce.

The application contained simply a denial of the allegations of the libel, and averred that the libellant had previously been guilty of adultery.

A notice of the application to vacate the decree, was served at the reputed

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residence of the libellant. But the fact that she was at the time absent from the state, was communicated to the Court on the 7th of *March*, 1846, when the following decree was entered by the Court:

"Ordered, that the proceedings and decree in this case be annulled, on the ground that the same was obtained by fraud and imposition on the Court. There was nothing on the record showing that any proof was taken preparatory to this order, or that the libellant appeared. The verdict further found that the libellant had no issue by her husband, *Blesker*, but that by her second husband, *Wheatley*, she has issue—a child born *November 4*, 1846.

Whether the plaintiff could recover on the note, was the question submitted.

The Court gave judgment for the plaintiff.

Jan. 8, 1850, GIBSON, C. J.—The case which most distinctly recognizes the power of a spiritual Court to vacate its sentence, when obtained by imposition, is *Prudham v. Phillips*, stated in *Meadows v. The Dutchess of Kingston*, Amb. 763, and rather more fully in Harg. Tracts, 456, note. It was tried before Chief Justice WILLES, in 1737; and, though a *Nisi Prius* decision, it was quoted with approbation by Lord APSLEY. To show, by analogy, that the sentence in a suit of jactitation of marriage is conclusive in a common-law action, the chief justice took a distinction founded on the common-law principle, that a party to a fraudulent judgment can reverse it only directly, but that a stranger may reverse it collaterally, by pleading and evidence. "Who ever knew," he said, "a defendant plead that a judgment against him was fraudulent? He must apply to the Court; and if both parties colluded, it was never known that either of them could vacate the judgment. Here the defendant was a party to the sentence, and whether she was imposed upon, or whether she joined in deceiving the Court, this is not the time and place for her to redress herself. She may, if she has occasion, appeal, or apply to the proper judges."

So was it with the legitimate husband in the case under consideration. The time for appeal had gone by, and he applied to the only tribunal that was open to him. Chief Justice WILLES does not intimate how it ought to proceed on the application; but it must necessarily be by summary examination and order. In Bacon's Abr. Error, 1, 6, the remedy for a surreptitious judgment at common law, is said to be a writ of error *coram nobis*; but *Ronney v. Robinson*, 2 Roll. Abr. 724, which is cited for it, leans the other way. If a clerk of the King's Bench, it was there said, enter judgment against an order by a judge of the Court, it may be vacated at a subsequent term. If by a writ of error, it would have been unnecessary to say anything about the time; and the meaning undoubtedly is, that such judgment may be vacated after the term, just as if the records were still in the breast of the Court. That case shows that the principle of *Prudham v. Phillips*, is a general one, and applicable alike to ecclesiastical sentences and common-law judgments. It has no relation to the doctrine of amendments, which make the records speak a language it did not speak before; the vacation is a new and independent judgment, of which the recorded entry is its appropriate evidence. If it can be entered only on a writ of error, what is to be done with a surreptitious sentence of an ecclesiastical Court, to which no such writ lies? As imposition on it would else be without means of correction, it must necessarily have a power of summary revision. Facts put in issue, as they may be, by pleading in error, are triable by jury; but as there is no jury in such a Court, there is the less objection to

summary proceeding by it. There is certainly more reason for it than there was in *Ronney v. Robinson*. There a statute has given the Common Pleas jurisdiction in libel for divorce; but it has not made it a Court of record in any other aspect, than the one in which it had before been considered. Its proceedings in divorce are not according to the course of common law—at least where a feigned issue is not directed—and no writ of error lies to remove its sentence, whatever may be its power to remove the record of such an issue. In every other respect, the remedy is by appeal, as it is in the ecclesiastical Courts.

It may seem an arbitrary act to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act, which was operative at the time; and, under the first impression, I would have decided as did the judge at *Nisi Prius*. But the legitimate husband also has rights, and if any one must suffer from the invalid marriage, it is he who procured it. By the terms of the contract, he took the lady for better for worse, and having assumed at least her moral responsibilities, he stands, as to hardships, in her place. He, therefore, has no right to complain. The children, who are the fruit of the connection, are the only persons who have it, if indeed to have been brought into the world in any circumstances, can give such a right; but their condition is not worse than that of the dishonored husband. There is no injustice, therefore, in the proper exercise of the power assumed in this instance; and the apparent danger of excess in the use of it, vanishes when it is viewed in connection with a principle which requires the record to exhibit the ground of every judgment. Possibly there may have been no sufficient ground exhibited in this case; but even if there were not, the order to vacate would be only erroneous, and unimpeachable after the expiration of the period for reversing it by appeal. In stating, however, the charge of imposition, without the facts and circumstances to sustain it, the Court has perhaps stated enough to justify their action upon it. Confidence must be reposed in the wisdom and justice of the tribunals; and hence the maxim, that all things are presumed to have been rightfully done in Courts of record. The indorser of the note in suit before us, had no property in it, and the plaintiff has no title.

Judgment for plaintiff reversed, and judgment rendered for defendant.

NOTE B.—*McGiffert v. McGiffert*, in the Supreme Court of *New York*, as reported in the *Daily Times* newspaper.

The complaint in this cause is filed by the wife against the defendant, her husband, for a divorce *a vinculo matrimonii*.

The parties being residents of this state, were married here on the 12th of *September*, 1850. They lived together but a few weeks, and then separated.

In *January*, 1851, the defendant filed his complaint against the plaintiff, claiming to have the marriage annulled, on the alleged ground of the physical incapacity of the plaintiff to consummate the marriage. This she denied in her answer.

On the 28th of *April*, 1851, an order was made in that cause, requiring the plaintiff therein to pay Court fees and alimony to the defendant in that cause, and the same not having been paid, an order was made in that cause, on the 15th of *October*, 1851, staying all proceedings on the part of the plaintiff therein, until paid, and the proceedings therein have been stayed and suspended.

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In *January*, 1852, the defendant went to the state of *Indiana*, leaving the plaintiff, his wife, in this state, where she has ever since remained. The defendant stated in his answer, that such residence in *Indiana* commenced on or about the 3d day of *January*, 1852, and that on the 10th day of *January*, 1853, being at that time a *bona fide* resident of that state, and having been for more than one year preceding said date, a resident of said state, he filed his bill against the plaintiff in this suit, for a divorce. On the 24th of *May*, 1853, the plaintiff in this suit not appearing, a decree of divorce was granted. In *October*, 1855, the defendant in this case returned to this state, accompanied by a woman to whom he had been married in *Indiana*, on the divorce granted there, with whom he has cohabited here. Upon these facts the complaint is filed, the plaintiff claiming that such intercourse of the defendant with the woman to whom he claims to be married, is adulterous, and entitles her to a divorce.

DAVIES, J.—I deem it unnecessary to discuss the many questions presented in this case. It appears to me that it must be disposed of on the authority of *Vischer v. Vischer*, 12 Barb. 643, and the authorities there referred to. The Court in *Indiana* never had jurisdiction of the plaintiff in this case, and the proceedings there as to her are void. As remarked by Justice HIND, in the case referred to, "It is a sound principle of law, as well as of natural justice, that no person should be bound by a judgment without being heard." And he cited a large number of cases to sustain this position. In this state, besides the case of *Vischer v. Vischer*, above cited, the same principle in reference to divorce was applied in the case of *Borden v. Fitch*, 15 Johns. 121. In this case, the husband being in the state of *Vermont*, applied there, his wife then being in *Connecticut*, and never having been in *Vermont*, and having no notice of the proceeding for a divorce, which was granted. He came into this state and married another woman, his first wife being still living, and the case turned upon the effect of the divorce granted in the state of *Vermont*.

THOMPSON, C. J., in delivering the opinion of the Court, says, that it appeared from the testimony that the former wife never was in the state of *Vermont*, nor in any manner personally notified or apprised at the time of the proceedings in *Vermont* to obtain the divorce. She did not, in any manner, by her agent or attorney, appear or make any defense against such proceedings. A precisely similar state of facts is presented in the case now under consideration. The Chief Justice says: "The final question is, whether such proceedings in *Vermont* were not absolutely void. To sanction and give validity and effect to such a divorce, appears to me to be contrary to the first principles of justice. To give any binding effect to a judgment, it is essential that the Court should have jurisdiction of the person and of the subject-matter; and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it; the want of jurisdiction makes it utterly void and unavailable for any purpose."

These positions are well sustained by authority and sound reasoning, and I have been unable to find any case where the force of this has been questioned. We have already seen that it was recognized as law in the case of *Vischer v. Vischer*, above referred to; and I feel no hesitation in saying that I am not at liberty to question the binding force of these authorities. They decide the precise point presented in this case, holding a decree obtained as this was to be utterly void, and unavailing for any purpose whatever. It therefore follows that it affords no legal justification for the defendant in cohabiting with any

other woman than the plaintiff, his lawful wife; and the facts of such cohabitation, and the other facts necessary to entitle the plaintiff to a divorce *a vinculo*, being clearly established, I have no choice but to direct a decree for a divorce. A reference may be had to settle the proper alimony to be paid to the plaintiff.

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Equity will not aid in perfecting title under a voluntary deed.

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185	642

APPEAL from the *Switzerland* Circuit Court.

Tuesday,
December 6.

PERKINS, J.—This was a suit by *Jonathan M. Froman* against *Paul Froman*, *William C. Froman*, *Hiram Froman*, and *Keziah Froman*, for partition.

Hiram Froman answered, setting up title in himself to the whole of the land of which partition was asked.

The facts are these: *Paul Froman* owned a part of the south-east quarter of a certain section of land, on which he, with his wife, *Keziah*, resided. Some fifteen years ago said *Froman* and wife made a voluntary deed to one of their sons, *Hiram Froman*, of the south-west quarter of said section. Subsequently, said *Paul* made a voluntary deed of the south-east quarter to his wife, *Keziah*, and his sons *Jonathan*, *William*, and *Hiram*. Of this last-named tract, and upon these last-named conveyances, partition is sought. *Hiram* sets up his deed to the south-west quarter, alleges that it was made for that quarter by mistake, when the south-east quarter was intended, asks that it be reformed, the title to the south-east quarter decreed to be in him, and the partition denied.

The Court refused to correct his deed, and gave judgment for partition. The Court acted upon the ground that equity would not aid in perfecting title under a voluntary deed, in a case like the present. And such seems to be the law. 2 Story's Eq. Juris., § 793.

A Court will not decree the specific performance of a

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contract, unless it is founded on a consideration. Ind. Dig. 298.

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In one case, *Watts v. Bellas*, 1 P. Wil. 60, a voluntary defective conveyance of land was made good. This case is mentioned by Chancellor KENT, in *Gillespie v. Moon*, 2 Johns. Ch. 514, without disputing its authority. But it seems to have been overruled. See note to the case in P. Wil., *supra*, and Greenl. Overruled Cases.

We do not find the case cited in any elementary work which we have examined.

As to the right of a reversioner to apply for partition, see *Moody v. West*, 12 Ind. R. 399.

Per Curiam.—The judgment is affirmed with costs.

S. Carter and J. Sullivan, for the appellant (1).

S. C. Stevens, for the appellee (2).

(1) Touching what constitutes the delivery of a deed, counsel cited *The Commercial Bank v. Reckless*, 1 Halst. 430, 650; *Shirley's lessee v. Ayres*, 14 Ohio R. 307, 310; *Lloyd's lessee v. Giddings*, 7 Ham. 50; *Stewart v. Reddit*, 3 Md. R. 67; *Hughes v. Easten*, 4 J. J. Marsh. 572; *Parker v. Dunstan*, 2 Fost. 424; *Rosevelt v. Carson*, 6 Barb. 190; *Hale v. Hills*, 8 Conn. R. 39; *Jones v. Bush*, 4 Harring. 1.

(2) Counsel cited authority as follows:

The plaintiff, *J. Froman*, having only an interest in remainder or reversion, after an estate of freehold in his father and mother, and without right of entry, cannot maintain a petition for partition. 14 Mass. R. 434.—22 Ohio R. (2 N. S.) 207.—13 Pick. 251.—12 *id.* 374.—7 Mass. R. 475.—19 Wend. 367.—9 Cow. 562.—8 N. Hamp. R. 93.—2 Paige, 389.—5 Denio, 388.—1 Sandf. Ch. 202.—Co. Lit. 167.

Even if the deed was merely voluntary, it was good as between the parties to it, and void only as to creditors and subsequent purchasers for value, without notice. *Stanley v. Brannon*, 6 Blackf. 193.—*McNeely v. Rucker*, *id.* 391.

13	318
138	493
13	318
145	420

SYMMES and Another v. BROWN and Others.

Parol evidence is admissible to remove a latent ambiguity in a deed or will. And where such evidence is given, the whole, including the instrument, may be referred to the jury.

Where there is no ambiguity, the Court must declare the legal effect of the instrument.

There is no ambiguity in the deed copied in the opinion in this case.

The deed conveys the interest of each of the parties named in it, in the lands particularly mentioned in the premises, and again in the *habendum*.

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APPEAL from the *Ohio* Circuit Court.

Tuesday,
December 6.

PERKINS, J.—Suit for the partition of a tract of land lying in sections 35 and 36, in *Dearborn* county. The land originally belonged to one *Roger Brown*, and at his death, descended to his heirs, among whom were *Ethan A. Brown* and *Hannah B. Symmes*. *Ethan A. Brown* died, leaving heirs to whom his interest in said land descended, one of which heirs was *Hannah B. Symmes*.

In this suit for partition, *Hannah B. Symmes* claims two shares in the land to be divided; one as heir of *Roger Brown*, and the other as heir of *Ethan A. Brown*, while the remaining heirs of *Ethan A. Brown* insist that she had conveyed to *Ethan A.*, in his lifetime, all her interest as heir of *Roger Brown*, so that she is now entitled but to the share falling to her as heir of *Ethan A. Brown*.

It is claimed that said *Hannah* conveyed her interest in sections 35 and 36 by deed, as follows:

“These presents are to testify that we, *Peyton S. Symmes* and *Hannah B. Symmes*, wife of said *Peyton S. Symmes*, of *Cincinnati*, in the state of *Ohio*, in consideration of the sum of seven hundred and fifty dollars, paid to us by *Ethan Allen Brown*, of the state of *Indiana*, do bargain, sell, release, and quitclaim to the said *Ethan Allen Brown*, and to his heirs and assigns forever, all the right, title, interest, and claim in law and in equity, which the said *Hannah B. Symmes*, and her brother, *David B. Close*, since deceased, of whom the said *Hannah* is heiress at law, derived by inheritance of and from their grandfather, *Roger Brown*, or otherwise acquired, and also all right, title, and interest, present and future, of the said *Peyton S. Symmes*, by virtue of his marriage with his said wife or otherwise, in and to the land contained in section twenty-two, and fractional section twenty-three, in the fourth township of the first range west of the meridian of the mouth of the great *Miami*

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river, said lands lying in the county of *Dearborn*, state of *Indiana*, and in the possession of the said *Ethan A. Brown* and of his assigns now being: To have and to hold the said section and fractional section, with the appurtenances, to the use of said *Ethan Allen Brown*, and of his heirs and assigns forever.

"In evidence whereof, we, the said *Peyton S. Symmes* and *Hannah B. Symmes*, do hereunto subscribe our names and affix our seals, at *Cincinnati*, on this thirtieth day of *December*, in the year one thousand eight hundred and forty-three.

"*Peyton S. Symmes*, [seal.]

"*Hannah B. Symmes*, [seal.]"

"State of *Ohio*, *Hamilton* county, ss: Before me, *Ebenezer Harrison*, a justice of the peace in and for the county aforesaid, on this 19th day of *February*, 1844, personally appeared *Peyton S. Symmes* and *Hannah B. Symmes*, his wife, makers of the within indenture, and acknowledged the same to be their voluntary act and deed, for the uses and purposes therein mentioned. The said *Hannah B. Symmes*, on being questioned apart from her husband, and the contents of the within deed made known to her, declared that she executed the same of her own free will, without fear of her said husband or compulsion on his part—the word four in the fourth line from the top interlined before signing.

"*Ebenezer Harrison*, [seal.]

"Justice of the Peace."

The admission of this deed in evidence was objected to, on the ground, alone, that the same was only a conveyance of the interest of *Symmes* and wife in sections 22 and 23, and not in sections 35 and 36.

It was proved that *Ethan A. Brown* was in possession of sections 35 and 36. There was no proof, aside from the allegation in the deed, that he was or was not in possession of sections 22 and 23; nor that said sections had or had not belonged to *Roger Brown*.

The Court admitted the deed in evidence.

It was then contended by *Symmes* that the construction of that deed was for the Court; that it was for the Court

to declare its legal effect; to say what it conveyed. On the other hand it was contended that there was a latent ambiguity in the deed, an uncertainty as to the subject-matter to which it was to be applied; that the parol evidence, that *E. A. Brown* was in possession of sections 35 and 36, and that they descended from *Roger*, taken in connection with the deed, tended to explain the ambiguity, and made a question upon the whole evidence for the jury. The Court held this view of the question, and referred all the evidence to the jury. They found that the deed conveyed the interest of Mrs. *Symmes*, in sections 35 and 36, to *Ethan A. Brown*, and that, in the pending partition, she would only take a share as heir of said *Brown*.

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Parol evidence may be given to remove a latent ambiguity in a deed or will. See *Stevenson v. Druley*, 4 Ind. R. 519; 2 Phil. on Ev., ed. 1859, p. 644. And where such evidence is given, the whole, including the written instrument, may be referred to the jury. 2 Phil. on Ev., ed. 1859, p. 640.

But is there any ambiguity in the deed above set forth? If not, the Court should have declared its legal effect. And further, if there is no ambiguity in the deed, its construction by the Court would determine the rights of the parties under it, and this fact should have controlled the decision on the motion for a new trial; because, if the jury found against the construction the Court should have given, it rendered their verdict plainly erroneous. On the best reflection we can give, it seems to us that there is no ambiguity in the deed in question.

It is contended by the *Browns*, that the deed contains two clauses: 1. A release to *E. A. Brown* of all the interest, &c., of Mrs. *Symmes*, legal and equitable, in and to the estate of *Roger Brown* which she had therein, derived by inheritance from him. 2. A conveyance by *Peyton Symmes*, of all the right and interest he had in sections 22 and 23, by virtue of his marriage with Mrs. *Symmes*.

But we think the deed conveys the interest of each of said parties in the lands particularly mentioned in the premises, and again in the *habendum* of the deed. See 4

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Cruise, top p. 348 in 2 Greenl. Cruise. This, we think, is the plain reading of the deed, and there is nothing in the evidence conflicting with it. The fact that sections 35 and 36 are in *Dearborn* county, is no evidence that sections 22 and 23 are not in the same county. The fact that *Ethan A. Brown* was in possession of sections 35 and 36, is no evidence that he was not also in possession of sections 22 and 23. And the fact that sections 35 and 36 once belonged to *Roger Brown*, is no evidence that sections 22 and 23 did not also once belong to him.

Had it been proved that sections 22 and 23 were not in *Dearborn* county, &c., it would have appeared that there was a mistake in the deed; but with this view we now have no concern.

The deed in question is plain in its language, specific as to property embraced, and there is nothing in the evidence to contradict its recitals, and no need of evidence to explain them.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. M. Donald and *A. G. Porter*, for the appellants (1).

J. Sullivan, for the appellees (2).

(1) Counsel for the appellees cited the following authorities:

That the certificate of acknowledgement of the deed was insufficient, B. 8. 1843, p. 421; *Butterfield v. Beall*, 3 Ind. R. 203.

That the *habendum* of a deed, being no longer of any value for the purposes for which it was anciently used, is, in modern times, looked to, as any other part of the deed, to ascertain the true sense and meaning of the whole, *Seymour's Case*, 10 Coke, 419; *Sumner v. Williams*, 8 Mass. R. 162; *Jackson v. Ireland*, 3 Wend. 99; 2 Greenl. Cruise, * 272.

That the Court erred in leaving the construction of the deed to the jury. *Harris v. Doe*, 4 Blackf. 369; *The Richmond, &c., Co. v. Farquar*, 8 id. 90.

(2) Excerpt from Mr. *Sullivan's* brief:

The Court committed no error in permitting the jury to hear extrinsic evidence to aid them in the construction of the deed from *Symmes* and wife to *E. A. Brown*. Numerous cases might be cited in support of this position, but for the sake of brevity I refer to a collection of authorities to be found in 4 Phil. Ev. by Cowen and Hill, p. 495, note 263. Also, 2 id., ch. 7, §§ 1, 2.

The rules for the construing of wills and of other written instruments, are the same. 2 Phil. Ev. *supra*, per Chief Justice TINDALL, in *Shore v. Wilson*. Also, 4 id., p. 495, note 260; 1 Greenl. Ev., § 287, and note 3.

It is said by appellants, that the deed of *Symmes* and wife to *E. A. Brown*, is, so far as it applies to property other than sections 22 and 23, void for uncertainty. This, I think, is not true, provided the property can, by the aid of extrinsic evidence, be identified. Moreover, when the grantee is in possession before the deed is made, or is put into possession at the time of making the deed, the rule in regard to uncertainty of description cannot apply. But in this case there is no uncertainty. Whatever Mrs. *Symmes* derived by inheritance from her grandfather, *Roger Brown*, or from her brother, *David Close*, was conveyed.

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In *Miller v. Travers*, 8 Bing. 244, a devise of all the testator's property in the city of *Limerick*, was held to be good, although extrinsic evidence was necessary to identify the particular property devised.

In *Goodtitle v. Southern*, 3 M. and S. 299, a devise of "all that my farm called *Troque's Farm* in the occupation of *C.*," was held sufficient.

If in the conveyance of an estate it is designated as "*Blackacre*," parol evidence must be admitted to show what field is designated by that name. So when there is a devise of an estate "purchased of *A.*," or of "a farm in the occupation of *B.*," extrinsic evidence is proper to show what estate was purchased of *A.*, or what farm was in the occupation of *B.* 1 Greenl. Ev., § 287. The same principle is recognized in *Beaumont v. Field*, 2 Chit. R. 275.

Although it is the province of the Court to construe written instruments, yet when the effect of such instruments depends, not merely on the construction and meaning of the instrument, but upon collateral facts *in pais* and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury. *Etting v. The Bank of the United States*, 11 Wheat. 59.—*Goddard v. Pratt*, 16 Pick. 412.—*Sidewell v. Roberts*, 1 Penn. R. 386, per GIBSON, C. J., and authorities cited.

The extrinsic facts above referred to, to-wit, that section 35 and fractional section 36 belonged to the estate of *Roger Brown*, sen.; that they were in possession of *E. A. Brown* at the date of the deed of *Symmes* and wife to him; that they then lay in *Dearborn* county; that sections 22 and 23 do not appear to have belonged to *Roger Brown's* estate, and that the conveyance was of property that Mrs. *Symmes* had derived by inheritance from her grandfather, *Roger Brown*, do, in the judgment of the appellees, sustain the construction given to the deed by the Circuit Court.

Inasmuch as these facts and circumstances were necessary to be ascertained in order to understand the deed referred to, and as the proper construction of the deed in view of these facts and circumstances was submitted to the jury by the consent of both parties, this Court, according to its uniform decisions, will not disturb the verdict. If there was error in it, which I deny, the rule *consensus tollit errorem* applies. *Dormer's Case*, 5 Coke, 40.

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It does not follow that because the owner of stolen goods, and his family, have no knowledge of the fact that the goods have been stolen, there is a concealment of the fact on the part of the thief.

Quære, what would amount to such a concealment.

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APPEAL from the *Steuben* Circuit Court.

WORDEN, J.—Indictment against the appellant for larceny. The indictment was found at the *March* term of the Court, 1858, and charged the defendant with the larceny of certain goods of one *George Emerson*, on the 10th day of *October*, 1855. It also charges that he concealed the fact of such larceny from the time it was committed until the 1st of *March*, 1858.

Trial, conviction of petit larceny, motion for a new trial overruled, and judgment on the verdict.

On the trial of the cause the Court gave to the jury the following instruction, to which the defendant excepted, viz.:

“If you believe, from the evidence, that the defendant did, in the month of *October*, 1855, steal the goods mentioned in the indictment; that *Emerson*, the owner of the goods, knew them at the time to have been stolen, you should acquit the defendant. But if *Emerson* and his family did not know that the larceny of the goods had taken place, and *Emerson*, or his family, did not know, or had good reason to believe, the crime had been committed, until within two years before the finding of the indictment, you may find the defendant guilty, if all the other facts necessary be proven.”

Prosecutions for larceny are barred by the lapse of two years from the time the offense is committed; but where the person committing the offense “conceals the fact of the crime,” the time of such concealment is not to be included in computing the period of limitation. 2 R. S. p. 363.

We are not called upon in this case to determine precisely what would amount to a concealment of the fact of

the crime, or whether the mere silence of the accused, and his failure to proclaim such crime, would be a concealment within the meaning of the statute. The charge given by the Court, assumes that unless *Emerson*, the owner of the goods, or his family, knew that the crime had been committed, or had good reason to believe it had been committed, there must necessarily have been a concealment on the part of the accused, although the balance of the world might have known it.

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It does not follow, because the owner of stolen goods, and his family, have no knowledge of the fact that the goods have been stolen, that there is a concealment of the crime on the part of the thief. Such crime may be openly and publicly proclaimed and known to the officers of the law, and the community in general, and yet not come to the knowledge of the owner of the goods, or his family.

There was evidence before the jury strongly tending to repel the idea of a concealment, and the charge, we think, was wrong, and probably misled the jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the appellant.



THE INDIANA CENTRAL RAILWAY COMPANY v. HUDELSON.

The plaintiff, without having procured a ticket, was crossing a side track of a railroad, in the night, to get upon a passenger train at its usual place of stopping, on the main track; but by the negligence of the employes of the company, a switch had been left open, and the train was thrown upon the side track, and ran against the plaintiff and broke his leg.

Held, 1. That he was not a passenger at the time of the injury.

2. That he had the same right to cross the side track as he did, that persons have to cross a railroad upon a public street or highway.

3. The company having the legal right to run their train upon the side track, it is immaterial whether it was run upon that track by accident or design, if run with due care. No greater care would be required in case of such accident than if the train were thrown upon the track by design.

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4. If the train, in running up on the side track, was managed with due care, the plaintiff cannot recover.

APPEAL from the *Wayne* Circuit Court.

WORDEN, J.—This was an action brought by the appellee against the company, to recover damages for an injury received by the plaintiff, in consequence of the alleged carelessness and negligence of the agents and servants of the company, in so running their engine and train of cars, that the plaintiff was run upon and his leg broken.

Trial by jury, verdict and judgment for the plaintiff.

Exceptions were taken, which properly present the questions involved.

The following is a brief statement of the facts of the case:

The depot or station-house of the company, at *Ogden*, in *Henry* county, is situated on the south side of the railroad. In this building is the ticket-office. Between this building and the main track, over which passenger trains usually run, is a side track connecting with the main track east, but not west. The two tracks are about nine feet apart. Between this side track and the main track is a platform for passengers to get on and off the cars. In going from the ticket-office to the platform mentioned, a person must cross the side track. The switch connecting the side track with the main track, is about two hundred and seventy feet east of the depot-building mentioned. On the afternoon of the 17th of *October*, 1856, the servants of the company had been using the side track, and had left the switch in such a situation as to throw the train coming from the east on to the side track, instead of coming in on the main track. On that evening, the plaintiff, desiring to take passage for *Indianapolis*, repaired to the ticket-office for a ticket; but the agent not having the office lighted up, and there not being time to light up and procure a ticket before the approaching train from the east would arrive, none was procured. The train came at about the usual time, half after seven o'clock, and, in consequence of the situation of the switch, ran in on the side track. The

plaintiff, upon the approach of the train, started towards the platform mentioned, and as he placed one foot upon the side track, and had raised the other to make another step, the cow-catcher struck the leg or ankle thus on the track, and broke it. The train approached rather slowly, the breaks being applied and the engine reversed, with a brilliant head-light burning. The train ran but a short distance after it struck the plaintiff, stopping about one hundred feet east of the usual stopping point when running in on the main track.

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The charge of the Court to the jury, as to the negligence of the company which would render them liable, and as to the negligence of the plaintiff, which would deprive him of a recovery, was explicit, and mainly correct; but there is one point upon which we think an error was committed.

The following instructions were given, and exceptions taken, viz.:

"10. It was the duty of the railway company to keep the switch in proper order to pass the train on the track that it is intended to run on; and if it was left open by the track hands, or not properly looked to by those in the employ of the company whose business or duty it was to look to or attend it; and if, in consequence of its being left open, the train was improperly run in on the side track, when it was intended to be run on the main track, these would be acts of negligence on the part of the servants and employes of the railway company, from which the jury may infer the want of reasonable care; and if the train, in being so improperly run on the side track, or the locomotive thereof, struck the plaintiff when he was crossing the side track to the passenger platform for the purpose of going on the train as a passenger, and caused the injury complained of, the jury may find for the plaintiff, unless such injury was materially contributed to by the negligence or want of reasonable care on the part of the plaintiff, when, by the exercise of such reasonable care, he might have avoided the injury.

"11. If it was not intended to run the train on the side

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track, and if the engineer of the locomotive, when the engine was approaching the switch-stand at the station, by the use of reasonable care, could have seen the switch was open, in time to have stopped the engine before running on the switch, or before reaching the station on the side track, it was his duty to have done so, and a failure to do so would be negligence."

The defendants asked the following instruction, which was refused, and exception taken:

"17. If the jury should find from the evidence, that the switch from the main track to the side track had been negligently left open by the section hands or persons having the repairs of the track in charge, in the afternoon or evening of the day on which the injury occurred to the plaintiff, and some one or two hours afterwards, the passenger train, without fault of the persons running it, ran it, in the night time, on the side track, and proper signals were given by the whistle of the engine, and the engine had a good head-light in front, and the plaintiff negligently, and without looking towards the approaching train, and knowing it was approaching, stepped on the side track and was run against by the engine, at the time as alleged in his complaint, and thereby materially contributed to the injury, he cannot recover in this suit."

As a question preliminary to the main one arising on the instructions given, and that refused, we may inquire whether the plaintiff, at the time of the injury, should be considered a passenger.

In *Pierce on Am. Railr. Law*, 264, it is said that "The peculiar liability of a railroad company, as a common carrier, for the safety of passengers, &c., rests on principles of public policy and the law of contracts, which have no application to injuries to parties to whom the company has assumed no such special obligations." "Collisions between a locomotive and persons crossing the track in carriages and on foot, where it intersects a street or highway, present a case where both the person and the company are exercising an equal legal right, independent of any contract or favor extended by one to the other. The individ-

ual has a right to cross the track, and the company has the right to cross the highway. This is not, on the one hand, the case of a passenger, in the carriage of whom the company's liability is governed by a contract express or implied, founded on an adequate consideration, which is broken by a neglect to use the highest degree of skill and diligence; nor is it the case of a wrongdoer unlawfully on the track, and having no claim but for wanton injury. It is the common occurrence of two parties holding equal, independent rights, the exercise of which by one, may result in consequential injury to the other. The duty of each, under such conditions, in conformity with the principles of natural justice, and municipal law, is to use ordinary care in the exercise of his own right, to avoid injury to the other. If, notwithstanding such care by both parties, an injury happen, it is a misfortune which must be borne by the sufferer alone."

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The relation of carrier and passenger being founded in contract, express or implied, according to the above authority, it is clear that the plaintiff is not to be considered a passenger at the time of the accident, as no contract for his carriage, either express or implied, had then been entered into. Nor yet was he a trespasser or wrongdoer upon the track. The way provided by the company, for passengers, or persons designing to take passage, to go from the depot-building and ticket-office, to the platform from which to get on to the cars, led across the side track. The plaintiff, it seems to us, had the same right to cross it that he would have had to cross the track where it intersects a public street or highway. There seems to be no essential difference in the two cases. It may be admitted that the company "is bound to provide safe and sufficient means of access to its stations for the accommodation of passengers." *Pierce on Am. Railr. Law*, 474. The action is not founded on any neglect to provide such means of access, nor does it appear that the means provided were not safe and sufficient. Viewing the plaintiff, not as an actual passenger, but as having the right to cross the side track in the same manner as if he were upon a public street or

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highway, we will proceed to examine the charges given, and that refused.

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The proposition that the company had the legal right to run their train upon the side track, is not controverted by counsel for the appellee. Nor is it disputed by counsel for the appellant, that if they did so run upon the side track, they might be bound to exercise a greater degree of care than when running upon the main track, because of the greater danger of doing injury.

We think the defendants' liability, on the supposition that the plaintiff was guilty of no negligence, depends upon the manner in which the train was being run at the time and place of the injury, and not merely upon the fact that through the negligence of those in the employ of the company, in having left the switch open, the train was unintentionally thrown upon the side track. The company having the legal right to run their train upon the side track, it is wholly immaterial whether it was run upon that track by accident or by design, if run with due care, and without negligence. No greater degree of care would be required in running the train upon the switch track when taken by accident than when taken by design. It will scarcely be contended that if the train were to be run upon the side track designedly, and with proper care and caution, the company would be liable for any casualty that might happen to a person standing upon or crossing the track. Nor would they be liable for such casualty, if the train were to be run in a careful and proper manner, without negligence, though that track should be run upon in consequence of the switch having been carelessly left open.

To illustrate this proposition—suppose the switch had been five or ten miles east of *Ogden*, the place where the injury occurred, and from that point to *Ogden* there were two tracks, a main and a side track. Now suppose, when the train came along to the switch, that being open, it was thrown upon the side track, and on that track ran into *Ogden*. Now, if proper care and circumspection were used in running the train upon that track into *Ogden*, and at the place where the injury occurred, it is clear that the

company would not be liable, and it would seem to be wholly immaterial, in the case supposed, whether the side track was taken by design, or accidentally, in consequence of the switch having been negligently left open. The principle must be the same whether the switch be far off, or near the place where the accident occurred.

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The fact that the side track was there, was notice to all persons cognizant of that fact, if not to all the world, that a train might be run upon it.

Admit that it was the carelessness of the company's agents, in leaving the switch open, that threw the train upon the side track. This carelessness caused to be done only that which the company had a perfect, legal right to do, viz., it caused the train to be run upon the side, instead of the main track. The company having the right to run their train upon the side track, if, in the exercise of that right, due care and prudence were observed on the part of those running the train, it is difficult to perceive on what legal principle the company could be held liable for such accident.

From the charges given, the jury might have understood, and probably did understand, that if it were not intended to run the train upon the side track, the negligence of the company's servants in leaving the switch open, was sufficient to render the company liable, without reference to the manner of running the train, whether carelessly and negligently, or with due caution and prudence.

Counsel for the appellee say, they "do not understand how a locomotive can be run with due care, if it is run unintentionally. We are not, however, prepared to say that a train may not be run with due care, both before leaving the main track, and after passing from it to a side track, although unintentionally thrown from the main to the side track in consequence of the negligence of others in leaving the switch in such a situation as to cause that result.

The charges should not have been given, as their tendency was to mislead the jury. The charge asked by the defendants appear to have been correct, and we see no rea-

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son why it should not have been given. For these reasons the judgment below must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman and *J. P. Siddall*, for the appellants (1).

O. P. Morton, *W. Grose*, *J. H. Mellett*, and *E. B. Martindale*, for the appellee (2).

(1) Counsel cited *Pierce* on Am. Railr. Law, 265, 276, 282, 283, 284, and notes; *Neal v. Gillett*, 23 Conn. R. 437; *Pars. Merc. Law*, 228; *Butterfield v. Forrester*, 11 East, 60; *Redf. on Railw.* 330; 1 *Pars. on Cont.* 700, and cases cited in note (y) on p. 701; *Ang. on Car.*, § 556; 12 *Pick.* 177; *Brand v. The Schen. and Troy Railroad Co.*, 8 Barb. 368; *The Shelbyville, &c., Railroad Co. v. Lewark*, 4 Ind. R. 471; *Altrueter v. The Hudson River Railroad Co.*, 2 E. D. Smith, 151; *Am. Law Reg.* for 1857, p. 309; *Sheffield v. The Rochester, &c., Railroad Co.*, 21 Barb. 339; *Spencer v. The Utica, &c., Railroad Co.*, 5 *id.* 337; *Runyon v. The Central Railroad Co.*, 1 *Dutch.* 558; *O'Brien v. The Philad., &c., Railroad Co.*, *Leg. Intel.* March 5, 1858, *Philad.*; 13 *Pet.* 181; 19 *Conn. R.* 566.

(2) Counsel cited *March v. The Concord Railroad Corp.*, 9 *Fost.* 9; *Pierce* on Am. Railr. Law, 474; *McElroy v. The Nashau, &c., Railroad Corp.*, 1 *Am. Railw. Cases*, 591, upon the principal question.

TUCKER v. THE STATE, on the relation of GRAY, District Attorney.

Tuesday,
December 6.

APPEAL from the *Hamilton* Court of Common Pleas.

HANNA, J.—Suit on recognizance. Answer by surety, that his principal appeared at the *February* term of said Court, as provided in the recognizance, was tried, convicted and fined, and, “without his knowledge or consent, was then and there permitted to depart, without first having paid or replevied said fine; that thereupon said cause was stricken from the docket of said Court; that, at the *August* term, the plaintiff placed said cause again on the records of said Court, without giving defendant notice, and caused a default to be entered.” A demurrer was sustained to the

answer. Finding and judgment for the amount of the recognizance. No motion for a new trial. Nov. Term,
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No motion for a new trial was necessary to present the question raised upon the demurrer, an exception having been once properly taken to the ruling thereon. THOMAS
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The next question is, what should have been the ruling upon the demurrer?

Whether the answer was sufficient or not, we need not decide, as the complaint was clearly bad. It sets forth that the recognizance was taken by the sheriff in *December*, and was conditioned that the principal therein should be and appear, &c., at the next term of the Common Pleas Court thereafter, &c. It does not show what was done at the next term of the Court—whether the defendant appeared or not, or whether the case was continued or not; but then avers that, at the *August* term, he was called and defaulted.

The complaint was bad. *Kiser v. The State*, at this term (1). And the demurrer should have been sustained to it.

Per Curiam.—The judgment is reversed with costs, cause remanded, &c.

N. O. Ross and *R. P. Effinger*, for the appellant.

(1) *Ante*, 80.

THOMAS v. BOYD.

Where a will vested a fee simple in the children of the testator, with the condition that they should support his widow and one of his sons during life, furnishing them a residence, and provided that upon failure of such support, &c., the devisees, or either of them, might subject the land to the payment of any debts necessarily incurred for their maintenance, &c., it was *held* that the will did not give the widow the primary right to control the land.

Quære, whether leasing the land was the proper course to be pursued by the widow, upon condition broken, to subject the land, &c.

APPEAL from the *Hendricks* Circuit Court.

HANNA, J.—Suit by *Boyd* to recover possession of lands.

*Tuesday,
December 6.*

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v.
BOYD.

Averment that he is the owner, for one year from, &c., and entitled to the possession of, certain lands described, &c.

Answer, first, denying that he is the owner, &c., and averring that the defendant is the owner, &c.; second, that two-thirds of said land was and is the soil and freehold of the defendant; third, specific denials of each allegation in complaint, and averment that plaintiff was benefited by being kept out of possession; fourth, admitting that plaintiff made a contract of renting with one *Martha Hiatt*, by virtue of which he would have been entitled to the possession of said land if he had complied with said contract, but that he did not comply, &c., in this, that he was to give security for the payment of the rent, which he did not do, and that he was notoriously insolvent; and defendant, having purchased said rent of said *Martha*, refused to suffer said plaintiff to take possession of said land; and that plaintiff has suffered no damage by being kept out of possession, &c.

To the three last paragraphs of the answer, there was a general denial.

To the first, there was a denial, and also [averments] that the title of defendant is inferior to that of plaintiff; that defendant derived his title through the children of one *Harman Hiatt*; that by the will of said *Harman*, the said land was subject to the use and occupation of said *Martha*, for and during her natural life; that neither said defendant, nor those under whom he claims, had any title or interest in said lands without first providing said *Martha* with a support and residence for her life, which they did not do, &c.; and, therefore, she had a right to and did lease, &c.

The evidence shows that *Martha Hiatt* and her children had occupied the lands for several years after the death of *Harman*, said *Martha* for most of the time renting and controlling the farm, her sons sometimes controlling it; that she and plaintiff executed an agreement by which he was to have possession, &c., of said lands, for one year from the first of *March*, 1858; that after the agreement was executed, and before the first of *March*, she required him to

give security for the payment of the rent, 150 dollars, which he refused to do, and she then rented to defendant "by the year, or so long as she should live," at 100 dollars per year, and the defendant agreed "to take the farm as it now stands, and take his chances for his rent from *Henderson Boyd*."

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THOMAS
V.
BOYD.

The judgment of the Court was that *Boyd* recover the possession of the lands and costs.

The correctness of the finding and judgment depends upon whether, under the circumstances, *Martha Hiatt* had the right to rent the premises, &c., to said *Boyd*, and whether he had, even if the lease was valid, such an interest in the lands as would enable him to maintain his action for possession.

The will of *Harman Hiatt*, upon which the right of *Martha* to make a lease is based, is, so far as that point is involved, as follows:

"And I will and bequeath unto my children, *Alfred Hiatt*, *Mary Jane Hiatt*, *Edna Hiatt*, *Elizabeth Hiatt*, *Spencer Hiatt*, and *Rufus Hiatt*, and to their heirs and assigns forever, the real estate of which I am seized, &c. (describing it). The said real estate, however, is to be subject and liable for the support, maintenance, apparel, and residence of my wife, *Martha Hiatt*, and my son, *John A. Hiatt*, during their natural life. The said *Alfred*, *Mary Jane*, *Edna*, *Elizabeth*, *Spencer*, and *Rufus* furnishing, or causing to be furnished, at all times, a comfortable residence and support of food and raiment, also proper medical attention during the whole of the aforesaid time; and should the said *Alfred*, *Mary Jane*, *Edna*, *Elizabeth*, *Spencer*, and *Rufus* refuse or fail to furnish the said *Martha* and *John* with the necessaries aforesaid, then, and in that case, the said *Martha* and *John*, or either of them, may subject said lands to the payment of any debts necessarily incurred for their maintenance, residence, and apparel, as aforesaid, or any other person to whom the same may be due and owing."

The said *Martha* and *Alfred* were appointed to execute the will.

It was in evidence that said *John A.* was dead, and that

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v.
BOYD.

the defendant had obtained conveyances for the interests of *Elizabeth, Edna, Spencer, and Rufus*, heirs of said *Harman*.

The will vested the fee simple in the children of the testator there named, and cast upon them the burden of supporting his widow and one of his sons, so long as they should live, including a comfortable residence. Whether it was intended that the residence should be on the land so devised, or not, is not material to the determination of the point now at issue. The will did not give the primary right to the widow to control the land. If the legatees furnished her with all things requisite, by the terms of the will, she had no right to interfere with the property so bequeathed. If she possessed such right, it arose out of some contract or arrangement, either express or implied, entered into after the execution of the will. The failure or refusal of those who were ultimately to receive the land, to provide as required by the will, gave her certain rights, consequent upon such failure, to-wit, to subject the land to the purposes of support contemplated by the will. But, in the first instance, it seems to us that she looked to the persons named in the will for the intended support, nevertheless with the right reserved to charge the land with that burden, if they refused or failed in that respect. The obligation was equally binding upon the legatees, whether the land would annually yield ten times as much as might be necessary for that purpose, or would not yield one-tenth as much.

The plaintiff, in his replication, averred that the persons named had failed to make the provision required by the will. The evidence is all in the record. As no evidence was given establishing that fact, nor the fact that she possessed the right, by virtue of any contract or agreement, to lease the lands, there was such a failure of proof as required that a new trial should have been granted.

It is not necessary for us to decide whether leasing the land was the proper mode to resort to, under the will, to subject it to outlays necessary for the support of said *Martha* (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c. Nov. Term, 1859.

C. C. Nave and *J. Witherow*, for the appellant.

JONES
v.
MILLER.

(1) See *Petro v. Cassidy*, ante, 289.

JONES and Another v. MILLER and Another.

Where a testator devised his entire estate to his son, and provided that if he should die "without a lawful heir or heirs," the estate should go to the children of his daughter, it was *held*, that the words *lawful heir or heirs* were used in the limited sense of *child* or heir of the body at the time of the son's death. Upon the death of the son, without issue, the estate of the daughter's children could be sustained as being taken by an executory devise.

A fee may thus be limited after a fee.

A conveyance by the son before his death could not destroy or affect the estate limited to the children.

The estate thus created is not without our statute against perpetuities.

13	337
181	127
181	386
183	604
13	337
139	567
13	337
143	272
13	337
147	101

APPEAL from the *Randolph* Circuit Court.

PERKINS, J.—Suit by *Alexander* and *Paulina Miller*, Tuesday, December 6.
against *Julietta* and *James Jones*, to recover real estate. Recovery by the plaintiffs.

The suit turns upon the construction of the will of *Francis Stephen*.

By the first item of his will he directs the burial of his body.

By the second, he directs the payment of his debts.

By the third, he gives all his real and personal estate, after payment of debts and expenses, "to *Samuel Stephen*, my son, with the following exceptions, viz.: I give to *Paulina Miller* and *Alexander Miller*, the heirs of *Nancy Miller*, my daughter, one dollar each." He then gives a small sum to each of his other five children, and adds, "I further direct that if the aforesaid *Samuel Stephen*, my son, should decease without a lawful heir or heirs, that all that part of my estate, both real and personal, set off for the said *Samuel Stephen*, my son, shall be divided in equal

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JONES
v.
MILLER.

shares between the aforesaid *Paulina Miller* and *Alexander Miller*, the heirs of *Nancy Miller*, my daughter."

Samuel Stephen entered upon the land sued for, under the will, and sold and conveyed it to *Julietta* and *James Jones*, and soon afterwards died, leaving no child or heir of his body.

In his will, the testator used the words "lawful heir or heirs," in the limited sense of child or heir of the body of said *Samuel Stephen* at the time of his death. This is manifest from the fact that the heirs of his sister, to whom the devise over was, were his heirs in the general sense of the word.

Such being the case, the estate in those children could be sustained as being taken by an executory devise. A fee may be thus limited after a fee. See 3 Greenl. Cruise, top p. 441; *Nightingale v. Burrell*, 15 Pick. 104; *Anderson v. Jackson*, 16 John. 382; 1 Hill. on Real Prop. 635; *Eichelberger v. Burnitz*, 9. Watts, 450.

In *Hileman v. Bonslough*, 13 Penn. St. R. 344, Chief Justice GIBSON says: "In a will, the legal force of the word heirs may be controlled by the context, evincing such a demonstrative intention to misapply it, as cannot be mistaken; in an executed conveyance, never."

The conveyance made by *Samuel Stephen* cannot, we think, have any influence upon the decision of the cause.

"An executory devise cannot be prevented or destroyed by any alteration whatever in the estate out of which, or after which, it is limited, unless it be an estate tail." Whart. Dic., tit. Executory Devise.—Walker's Am. Law, 3d ed., p. 301.

An estate tail might be cut off, at common law, by a conveyance after issue born, not before. After the statute, *de donis*, it was held, in *Taltarum's Case*, that such an estate might be barred by fine, recovery, and lineal warranty with assets, &c.; but by these methods alone.

It was enacted by statute, in the 3d and 4th Wm. IV., that such an estate might be barred by deed. See 2 Blacks. Comm., ch. 7. In this case there was no issue born.

The proceedings by fine and recovery, and the doctrines

of lineal and collateral warranty, in their original forms, are not known to our law. 2 Bouv. Dic., p. 642.—4 Kent, p. 469, note c.

The statute of Wm. IV., is not in force here.

The estate created by the executory devise, was not, without the statute of this state, against perpetuities. 1 R. S. p. 238.

Per Curiam.—The judgment is affirmed with costs.

O. P. Morton and *W. A. Peelle*, for the appellants.

S. Colgrove and *J. Brown*, for the appellees.

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1859.

THE ANDER-
SON BRIDGE
COMPANY

v.
APPELATE.

13 339
126 108

THE ANDERSON BRIDGE COMPANY v. APPELATE and
Another.

To lay a proper foundation for secondary evidence, it must be shown that the original writing is lost, or destroyed by time, mistake, or accident, or is in the hands of the adverse party, who has had due notice to produce it on the trial.

Error in excluding such evidence cannot be examined by the Supreme Court, unless the record show a motion for a new trial.

APPEAL from the *Perry* Circuit Court.

Tuesday,
December 6.

DAVISON, J.—The appellees, who were the plaintiffs, brought an action against *The Anderson Bridge Company*, upon two promissory notes, each for the payment of 700 dollars, and each of which bears date *October 1, 1854*.

Defendants, in their answer, aver substantially that, in the year 1854, they entered into a written contract with the plaintiffs, whereby they agreed to construct a bridge across *Anderson River*, in *Perry* county, according to a plan furnished by them, the sufficiency of which they guaranteed, and for the construction of which, in accordance with such plan, the defendants agreed to pay the plaintiffs 4,400 dollars; that, under this contract, the plaintiffs commenced the work, and during the progress of it the defendants paid them the whole consideration stipulated in

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THE ANDER-
SON BRIDGE
COMPANY
V.
APPELATE.

the contract, save the several amounts specified in the notes in suit. The answer avers that plaintiffs constructed the bridge on the plan by them furnished; but the same, as constructed, is not a good, substantial, strong bridge; but, on the contrary, is defective and weak—so much so that defendants have been compelled to expend a large sum, viz., 700 dollars, in erecting and placing hog-chains and stays across said bridge, and placing wooden bents under it, to prevent the same from falling down, &c.

To this the plaintiffs replied, *inter alia*, that at the time of the execution of said notes, the defendants inspected the bridge, and received it from the plaintiffs as completed and finished according to the terms of said written contract, and executed the notes sued on, in full and final settlement of all matters in controversy between the parties in relation to the construction of the bridge; and that defendants then and there, with the consent of the plaintiffs, canceled and destroyed the aforesaid written contract, and the same was, by agreement of the parties, to be thereafter inoperative.

There was a verdict in favor of the plaintiffs for 1,694 dollars, the full amount of the notes and interest, upon which the Court rendered judgment, &c.

The record contains a bill of exceptions, wherein it is shown that, upon the trial, the defendants offered in evidence a true copy of the written contract referred to in the pleadings; but the Court refused their offer, on the ground that the original contract had been burned with their consent.

The rule seems to be, that in order to lay a proper foundation for secondary evidence, it must be shown that the original writing was lost, was destroyed by time, mistake, or accident, or was in the hands of the adverse party, who had due notice to produce it on the trial. 2 Phil. Ev., 4 Am. ed., 516, *et seq.*, and cases there cited. This doctrine has been fully recognized in this Court. Thus, in *Speer v. Speer*, 7 Ind. R. 179, it was held that proof of the contents cannot be permitted, if the deed has been surrendered or destroyed by the party's own voluntary act or conduct.

See, also, *Thompson v. Thompson*, 9 *id.* 323; *Smith v. Reed*, 7 *id.* 243. Nov. Term,
1859.

If these expositions of the law be correct, and we think they are, the decision of the Circuit Court cannot, in this instance, be held erroneous. WILSON
V.
THE STATE.

But it is insisted that, though the Court below may have committed the alleged error, still, there being no motion for a new trial, such error is not examinable in this Court. This position is well taken. The eighth statutory cause for a new trial is "error of law occurring at the trial, and excepted to by the party making the application. 2 R. S. p. 117, § 352. Under this provision, we have repeatedly decided that errors in rejecting proper, or giving improper, testimony, cannot be assigned in the Supreme Court, unless the record shows affirmatively that such errors, upon motion for a new trial, were pointed out in the lower Court. *The State v. Swarts*, 9 Ind. R. 221.—*Kent v. Lawson*, at the last term (1). The latter case is decisive of the point under consideration. Perk. Pr. 308, *et seq.*

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

A. L. Robinson and *D. T. Laird*, for the appellants.

L. Q. DeBruler and *B. Smith*, for the appellees.

(1) 12 Ind. R. 675.

WILSON and Others v. THE STATE on the relation of LASHLEY.

Where a constable attached certain property and placed it in the keeping of A., and taxed the expense of keeping it with the costs, and collected the amount, but failed to pay it over to A., it was held, that A. could not have an action upon his bond to recover it.

APPEAL from the *Wayne* Circuit Court.

Wednesday,
December 7.

DAVISON, J.—This was an action commenced before a

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WILSON
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THE STATE.

justice of the peace, against *Wilson*, a constable, and his sureties, on his official bond. The bond is thus conditioned: "If the said *Wilson* will safely keep, and punctually pay over to the proper persons or authority, all moneys which he shall receive or collect, or which shall, in anywise, come into his hands by virtue of his office, and shall in all other respects discharge all his duties as such constable," then the obligation was to be void, &c.

The breach assigned is, that, by virtue of a writ of attachment, at the suit of *John M. Maxwell*, against one *Lewis G. Collins*, the said *Wilson*, as constable, seized one hundred and twenty head of sheep, the property of *Collins*, which he, the constable, placed in the custody and care of one *Charles May*, to be by him kept and maintained, and that he, *May*, did keep and maintain them for the space of twenty days, for which care and maintenance he was entitled to at least 20 dollars, as costs, chargeable in said attachment suit, and therein taxed as costs.

It is averred that *May*, on the 16th of *December*, 1856, assigned his claim thus stated to *Alfred Lashley*, the relator, who, before the commencement of this suit, demanded it of the constable.

The justice gave judgment for the defendants, and the plaintiff appealed.

In the Circuit Court, there was a finding in favor of the plaintiff, and the Court having refused a new trial rendered judgment, &c.

The evidence shows that *May*, before the sheep were delivered to him, asked *Wilson*, the constable, where he, *May*, would get his pay for keeping them, when *Wilson* replied that the law allowed for such keeping, and that he would tax it up with the costs; and that to an execution issued upon a judgment in said attachment suit, *Wilson*, the constable, made the following return: "I return this execution, having levied on one hundred and twenty head of sheep, and having kept the same for twenty days, feeding them on corn. For keeping sheep, 20 dollars. Service, 28 cents. Mileage and return, 85 cents. Advertising, 15 cents. The whole, 21 dollars, 28 cents. *Edwin R. Wilson*,

constable." And further, it was proved that *Maxwell*, the plaintiff in the attachment suit, paid the constable the costs for keeping the sheep.

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1859.

WILSON
v.
THE STATE.

Upon this evidence, *May*, having at the instance of the constable taken and kept the property, is, no doubt, entitled to a compensation; but the inquiry arises—is he so entitled against the constable and his sureties? Here the property was seized by writ of attachment, and the statute in reference to that writ provides, whether the proceeding be instituted in the Circuit Court, Common Pleas Court, or before a justice, that "the necessary expense of keeping the attached property" shall be allowed to the officer who executes the writ, "to be paid by the plaintiff, and taxed in the costs." 2 R. S. pp. 67, 72, §§ 174, 196.

Under these provisions, it is evident that the expenses of keeping such property must be allowed "and taxed in the costs," to the officer who levies the attachment. And the result seems to be, that, in point of law, the costs thus taxed up are his own, and that he may dispose of them at his option. If this exposition be correct, and we think it is, the state in the present case, having founded her action upon the constable's official bond, cannot recover; because in favor of *May*, who kept the property, the law did not authorize any taxation of costs. Indeed, he was the mere employé of the constable, who was personally liable to him for the service which he performed. And, consequently, the failure of that officer to pay over to *May*, constituted no breach of the condition of the official bond.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. P. Morton and *J. F. Kibbey*, for the appellants.

M. Wilson and *C. H. Burchenal*, for the state.

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1859.

WORTHINGTON and Another v. BLACK.

WORTHING-
TON
v.
BLACK.

A wager upon the result of an election being illegal; the Courts will not aid the winner in recovering it in an action against the stakeholder.

Wednesday,
December 7.

APPEAL from the *Fountain* Court of Common Pleas.

DAVISON, J.—The appellants, who were the plaintiffs, brought an action against *Black*, to recover a certain amount of money deposited with him as a stakeholder upon a wager on the result of an election for Congress in the eighth congressional district in *Indiana*. The issues were tried by the Court, and found for the plaintiffs; and the Court, having refused a new trial, rendered judgment, &c.

The facts were these: The plaintiffs, on the 4th of *July*, 1856, deposited with the defendant, as a stakeholder, 100 dollars, as a wager on the result of an election for Congress in said district, at which election *James Wilson* and *Daniel W. Voorhees* were the opposing candidates, against 100 dollars then deposited with defendant, as such stakeholder, by one *Joseph Ogden*. The plaintiffs and *Ogden* directed the defendant, if *Wilson* was elected, to pay the entire amount, 200 dollars, to the plaintiffs, but in case *Voorhees* was elected, he, defendant, was directed to pay the same to *Ogden*. After the election had occurred, and, as the result, it had become known that *Wilson* had been elected, *Ogden* told the defendant not to pay over the money which he, *Ogden*, had deposited, until he “saw whether the bet had been fairly won, or until he had seen whether the election had been contested.”

The money deposited by the defendant has not been paid over, though the election has never been contested. The evidence shows that *Ogden* directed the defendant to pay over to the plaintiffs the money deposited by them, which he accordingly did; so that the present suit is for the recovery of that deposited by *Ogden*, which the defendant still retains in his possession.

It has been often decided that wagers upon the result of

an election are against the principles of sound policy, and consequently illegal; and being thus illegal, Courts will not aid the winner in the recovery of the wager from the loser, nor will they, if the loser has voluntarily paid the wager, entertain an action in his favor to compel the winner to repay it. Either party, even the loser, may recover the amount he has deposited, whether the wager or event has been decided or not, provided he demand the return of his stake before the money has been actually paid over, after the event, to the winner. *Bunn v. Riker*, 4 Johns. 426.—*Yeates v. Foot*, 12 *id.* 1.—*Frybarger v. Simpson*, 11 Ind. R. 59.—Chit. on Cont. 621, and authorities there cited.

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1859.

WORTHINGTON
v.
BLACK.

These principles, when applied to the case before us, at once show that the plaintiffs are not entitled to recover, because they base their action upon a contract with a stakeholder, which was illegal and void, as being against public policy; and, as we have seen, Courts will not lend their aid to any one who founds his claim or cause of action upon such a contract. *De Groot v. Van Duzen*, 20 Wend. 393.—20 Verm. R. 189.—5 Dall. 299.—5 Ind. R. 353.

True, either party to the wager, while the money deposited by him remains in the hands of the stakeholder, may sue for and recover it; because the suit, in that case, would not be on the contract of wager, but would, in effect, be a disaffirmance of it. And the contract being so disaffirmed, the party may well maintain an action against the stakeholder, as for money had and received for his use. But here, the plaintiffs having received the amount which they deposited, sue, as winners, for that deposited by *Ogden*, and thus affirm the contract. Their suit, thus instituted, is founded upon an illegal contract, and cannot, therefore, be sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ristine, for the appellants.

M. M. Milford, for the appellee.

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1859.

HIGGINS v. MINER and Another.

13	346	HIGGINS
144	90	v.
		MINER.

THE SAME v. MILLER.

The judgments in these cases were affirmed upon the authority of *Riggs v. Adams*, 11 Ind. R. 199.

Wednesday,
December 7.

APPEAL from the *Wayne* Circuit Court.

Per Curiam.—Suit by the appellees against the appellant, *Samuel S. Higgins* and *William W. Higgins*. As to *William W.*, process was returned “not found.”

Samuel S. answered, amongst other things, that said *William W.*, on, &c., at, &c., “unlawfully made a certain lottery to be drawn in said state of *Indiana*, for a division of personal and real property, to be determined by chance, said lottery not being authorized by law, and the said plaintiffs well knowing the purposes of said *William W. Higgins* in making said lottery, and that said *Higgins* was making said lottery, in furtherance thereof assisted him, the said *William*, in preparing said lottery and arranging the grounds in and about the same, in consideration of which service so rendered as aforesaid, and materials furnished, the said note was given, and for no other or different consideration; wherefore,” &c.

A demurrer was sustained to this answer, and exception taken.

Final judgment was rendered for the plaintiffs against *Samuel S.*, and he appeals to this Court.

The point raised is as to the sufficiency of the answer. The question involved in the answer is fully discussed in the case of *Riggs v. Adams*, 11 Ind. R. 199, and, according to the principle decided in that case, the answer is not sufficient.

The judgment is affirmed with costs.

W. A. Bickle, for the appellant.

J. Perry, for the appellees.

HAMILTON and Another, Administrators, v. THE GRAND
RAPIDS AND INDIANA RAILROAD COMPANY.

Nov. Term,
1859.

HAMILTON
v.
THE GRAND
RAPIDS, &c.,
RAILROAD Co.

The judgment in this case was reversed upon the authority of *Price v. the same company*, ante, 58.

APPEAL from the *Lagrange* Court of Common Pleas. *Wednesday, December 7.*

Per Curiam.—This was a suit upon a claim filed against the estate of *Robert Hamilton*, deceased. The claim is thus stated:

“Estate of *Robert Hamilton*, deceased, to *The Grand Rapids and Indiana Railroad Company*, Dr. *February 28, 1854.* To amount of his subscription to the capital stock of said company, this day payable in land. \$500.”

Demurrer to the complaint overruled, but no exception taken.

Defendants answered in fourteen paragraphs, to twelve of which demurrers were sustained; but no exceptions taken.

The issues were submitted to a jury, who found for the plaintiffs; and the Court, having refused a new trial, rendered judgment, &c.

The evidence shows that the company organized under the general railroad law in *January, 1854*, and that in *October*, in the same year, its directors “resolved that an assessment of 10 per cent. per month be and is hereby made on all unclosed subscriptions to the capital stock of the company, and that the same be demanded and collected by the proper officers.”

This resolution with other orders of the directors being in evidence, the defendants offered to prove, by a witness on the stand, that all the orders purporting to have been made by the board of directors of said company, and read in evidence to the jury, were passed and approved by three directors only, and when three and no more were in session. This offer was refused, and the defendants excepted. The proof should have been admitted. See *Price v. The Grand Rapids, &c., Railroad Co.*, at the last term (1).

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1859.

Upon the authority of the case cited, the judgment must be reversed.

HAYWORTH
v.
THE JUNC-
TION RAIL-
ROAD Co.

The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the appellants.

(1) *Ante*, 58.

HAYWORTH v. THE JUNCTION RAILROAD COMPANY.

Suit upon a subscription of stock to be paid in labor and materials within two years from the first election of directors; otherwise, payable in cash. The first paragraph of the complaint alleged neglect and refusal to perform labor, &c., for two years, &c.; that more than three years had elapsed, &c., whereby, and by reason of such refusal, the amount subscribed had become due in cash. General denial, and special paragraphs averring that the subscription was made under the original charter of the company, and afterwards the company consolidated with another company, and that defendant had never assented to the consolidation. General reply that defendant, before suit, had assented, &c. Demurrer overruled. The second paragraph of the complaint was admitted to be good.

Held, 1. That the demurrer reached back to the complaint, as a whole, and as the complaint contained a good paragraph, the demurrer was properly overruled.

2. That the first paragraph of the complaint was good after verdict, as under its averments a demand for the labor, &c., might be proved, if, indeed, such proof was at all necessary.

3. A verdict against the defendant in such case for the amount subscribed, in cash, is fully supported by proof that he assented to the consolidation, and made payments upon his subscription subsequently thereto, and that he had refused to perform the labor, &c. The written subscription proved itself.

Where the charter under which a subscription was made provided that subscriptions should be collected without relief, &c., and suit is brought upon the subscription, after a consolidation with another company, judgment is properly rendered without relief, &c.

Wednesday,
December 7.

APPEAL from the *Union* Circuit Court.

PERKINS, J.—Suit upon two several subscriptions of stock in the *Junction Railroad Company*, the terms of which were as follows:

"We, whose names are hereto subscribed, do each agree to take the number of shares set opposite our names, of the capital stock of the *Junction Railroad Company*, at 50 dollars for each share, to be paid in labor or materials, to be applied to the construction of the road, under the direction of the directors and upon the estimates of the engineer, within two years from the first election of directors. A failure to perform the work or deliver the materials, as above specified, shall render this a cash subscription, and the amount subscribed shall be paid on the same terms as stock subscribed to be paid in money.

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1859.

HAYWORTH
V.
THE JUNC-
TION RAIL-
ROAD CO.

Names.	No. shares.	Amount.
<i>Laban Hayworth.</i>	5	\$250.

"We, whose names are hereunto subscribed, do each agree to take the number of shares set opposite to our names of the capital stock of the *Junction Railroad Company*, chartered by the legislature of *Indiana*, at 50 dollars for each share, to be paid in cash to the treasurer of said company, at such times and in such sums as the board of directors of said company shall require. Provided, that not more than 20 dollars shall be required on each share the first year, nor more than 20 dollars on each share the second year—the whole amounts to be paid within three years from the first of *August*, 1852.

Names.	No. shares.	Amount.
<i>Laban Hayworth.</i>	1	\$50."

There are two paragraphs in the complaint, one upon each of the subscriptions.

The first alleges that the defendant, for the two years next succeeding the election of directors, wholly neglected and refused to perform the labor and furnish the materials, and that more than three years had elapsed since said election, whereby, and by reason of the refusal to perform the work, &c., said amount subscribed had become due in cash.

The paragraph upon the second subscription is admitted to be valid; no question arises upon it, and it will not be set out.

The defendant answered by the general denial, and sev-

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THE JUNC-
TION RAIL-
ROAD CO.

eral special paragraphs setting forth that the subscriptions of stock sued on were to the *Junction Railroad Company*, under its original charter, for a road between certain points; that afterwards said *Junction*, and a certain other railroad company consolidated, under the provisions of the Revised Statutes, in such case made and provided, for the purpose of extending the road of the *Junction* company to *Indianapolis* (the *Junction Railroad Company* being retained as the name of the consolidated company), and that he, the defendant, had never assented to the consolidation.

General reply, that the defendant, before the commencement of this suit, had assented to the consolidation.

Demurrer to the reply overruled, and exception taken.

The defendant contends that the demurrer to the reply reached back to the complaint; that the first paragraph of that, is bad for failing to aver a demand of the work, &c., mentioned therein; and that the demurrer should have been sustained as applicable to it.

The demurrer reached back to the complaint as a whole, and, as it contained one good paragraph, a demurrer to it as a whole was necessarily overruled. And the first paragraph, it may be remarked, is good after verdict, as under its averments a demand might properly be proved, if, indeed, such proof was necessary.

There was a trial of the issues of fact by the Court; judgment for the plaintiffs for 350 dollars, to be collected without relief, &c.

It is urged that the judgment is not supported by proof.

The evidence is clear that the defendant assented to the consolidation and merger into one, of the two railroad companies named in the answer. He even made a payment on his subscription after he knew of the consolidation. The written subscription proved itself, and it appears that he had refused to perform the work mentioned in it. Perhaps he was bound to show an offer to perform and furnish.

It is contended that the judgment is for too much. The amount of the subscriptions was 300 dollars; 20 dol-

lars were paid, leaving 280 dollars. The Court allowed about four years' interest. We cannot say that this was erroneous. The payments of stock would draw interest after refusal to pay as they became due.

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1859.

HILL
V.
THUERMER.

It is objected that the judgment is to be collected without relief, &c.; but the charter under which the subscription was made, provided that all subscriptions under it should be thus collected; and the consolidated company collected the sums subscribed according to the terms of the original subscription.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. S. Reid and *J. F. Gardner*, for the appellant.

J. C. McIntosh, for the appellees.

HILL and Another v. THUERMER.

APPEAL from the *Ohio* Circuit Court.

Wednesday,
December 7.

PERKINS, J.—Suit upon a promissory note.

Answer, that the note was given by defendant to *John Sexton*, in part consideration for *Richard E. Schroeder's* patent improvement for burning lime, for the territory of the county of *Ohio*, in the state of *Indiana*; and the said *John Sexton*, at the date of said note, conveyed the right of said patent improvement, for said county of *Ohio*, by deed, a copy of which is filed herewith, to defendant and one *John M. Scott*. And the defendant avers that said deed contains no description or specification of said improvement, so that it can be known in what it consists; wherefore, &c.

The deed describes the thing conveyed as being "*Richard E. Schroeder's* patent for an improvement for burning lime, for which letters patent were granted on the 6th day of *May*, 1851, securing to him," &c.

A demurrer was overruled to the answer, and it was

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1859.

FULLEN-
WIDER
v.
SAYLER.

held a good bar to the action, because the deed did not contain the specifications of the patent.

It was no bar. The deed sufficiently identified the thing sold. That was all that was required. If the purchaser wanted a copy of the specifications, he could send to the patent office and get them.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. C. Downey and *H. A. Downey*, for the appellants.

Wood and Wife v. WILKINSON and Wife.

Wednesday,
December 7.

APPEAL from the *Franklin* Court of Common Pleas.

Per Curiam.—This was an application for partition of real estate. Partition ordered, and commissioners appointed to make it. No report by commissioners. From the order of partition this appeal was taken.

The appeal does not lie from such order. *Griffin v. Griffin*, 10 Ind. R. 170 (1).

The appeal is dismissed.

G. Holland, for the appellants.

L. Barbour and *J. D. Howland*, for the appellees.

(1) See, also, 2 R. S. p. 330, § 8; 7 Ind. R. 345, 524; 8 *id.* 325, 377, 416; 9 *id.* 238, 322.

FULLENWIDER v. SAYLER.

Wednesday,
December 7.

APPEAL from the *Jasper* Court of Common Pleas.

Per Curiam.—No errors being assigned in this case, the appeal is dismissed at the cost of the appellant.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
O'DAILY and Wife.

Nov. Term,
1859.

CUBBERLY
v.
WINE.

APPEAL from the *Tippecanoe* Circuit Court.

Wednesday,
December 7.

PERKINS, J.—This was a proceeding for the assessment of damages occasioned by the laying of a track of the *New Albany and Salem Railroad*. The track was laid in a public street in the city of *Lafayette*, in front of *O'Daily's* property. The proceedings for the assessment of damages were under the act of 1852 (2 R. S. p. 193, § 710), and were instituted by *O'Daily*.

The fee simple in the streets of towns and cities in *Indiana*, would seem, during the existence of the corporation, to be in the public. At all events, this Court has decided that taking a street is not taking an "interest in the land" of the adjoining proprietor. *Protzman v. The Indianapolis and Cincinnati Railroad Co.*, 9 Ind. R. 467.

Yet it is only when such interest is taken, that the act of 1852 authorizes this proceeding for the assessment of damages. Hence, this suit could not be sustained under it. See *The Lafayette, &c., Plankroad Co. v. The New Albany, &c., Railroad Co.*, at this term (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. W. Chase and *J. A. Wilstach*, for the appellants.

(1) *Ante*, 90.

CUBBERLY and Another v. WINE.

APPEAL from the *Grant* Court of Common Pleas.

Wednesday,
December 7.

PERKINS, J.—Suit to foreclose a mortgage given to secure four notes of 125 dollars each, payable on the 1st of

Nov. Term,
1859.

BEESON
v.
CARLTON.

October 1858, 1859, 1860, 1861. The first note was due at the commencement of the suit. Judgment by default.

The judgment is as follows:

"It is therefore considered by the Court that the plaintiff recover of the defendant the sum of 133 dollars, 31 cents [the amount of the first note with interest], together with his costs, taxed at ———, to be collected without relief from valuation laws. It is further adjudged that the premises described in the mortgage, be sold on execution for the payment of said judgment, as on execution on a judgment at law."

This judgment is for the sale of the entire mortgaged premises.

It does not appear that the Court inquired whether the land mortgaged could be sold in parcels; and no provision was made as to the notes not due. These things should appear by the record to have been done. See *Greenman v. Pattison*, 8 Blackf. 465; *Lacoss v. Keegan*, 2 Ind. R. 406; *Allen v. Parker*, 11 *id.* 504. These cases show the practice.

Per Curiam.—The judgment is reversed with costs, back to the default. Cause remanded, &c.

L. Van Devanter and *J. F. McDowell*, for the appellants.

R. J. St. John, *A. Steele*, and *H. D. Thompson*, for the appellee.

BEESON v. CARLTON.

If a person contract with an infant to receive from him a conveyance of land, which he knows, at the time of contracting, will be executed before the infant shall have arrived at his majority, he cannot avail himself of that fact in defense of a suit upon a note for the purchase-money.

Wednesday,
December 7.

APPEAL from the *Madison* Circuit Court.

HANNA, J.—*Carlton* sued *Beeson* on a promissory note for 500 dollars.

Answer, that the note, and others not then due, were given to secure the payment of the consideration-money for a tract of land described in a title-bond made a part of the answer, &c.

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1859.

BEESON
v.
CARLTON.

It appears by the bond, that if the plaintiff, and *Nancy, William, and Agnes Carlton*, "on or before the 25th day of *December, 1859*, or so soon as the said *Benjamin F. Beeson* shall pay unto said *Carltons*," &c. (certain described notes, among them the one sued on), "shall, and do, upon the reasonable request of said *Beeson*, his heirs or assigns," &c., make a deed in fee simple, to certain lands, &c. "Now should the said *Carltons* comply with the above requisition, and keep the said *Beeson* in peaceable possession from and after the first day of *March, 1858*, then said bond to be null," &c.

The bond and note were dated, and the contract made, the 26th day of *December, 1857*.

The answer further alleged that *William* and *Agnes* were, at the time of pleading, minors of the age of fifteen years and no more; and that they would not "arrive at the age of twenty-one years by the 25th day of *December, 1859*, nor in time to convey the said real estate by the time when, by the terms of their agreement, they were to convey the same; and that they, nor either of them, have now any right or title to said real estate; and that they, nor either of them, can procure the title to said land on or by the 25th day of *December, 1859*, nor in time to convey the same when," &c.

A demurrer was sustained to this answer, because it did not state facts sufficient, &c.

Upon this ruling arises the only question in the case. It is insisted that the answer shows a partially executed contract, and the defendant in possession of the land, and is bad for not offering to rescind, &c. Upon the other hand, it is said that the answer shows that the plaintiff not only had no title, but could not procure one, and, therefore, was not in a position to insist upon an offer to rescind, &c.

The answer does not aver fraud, and to the reverse, alleges a fact which shows that the defendant must neces-

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1859.

TRACY
v.
KAUFMAN.

sarily, almost, have been aware of the minority of the two persons named, at the time he contracted for the land; to-wit, that they were then of the age of thirteen years.

The contract of an infant, of the character here indicated, is not void, but voidable by the infant only. If the defendant saw proper to contract with infants, to receive from them a conveyance which, as before stated, he must almost necessarily have known would be executed, at a time when they would be of such an age as to afterwards have the election to sanction or avoid the same, he cannot be permitted, after availing himself of the benefits of the contract, to plead such fact in bar of an action, in the form here presented. Whether it is sufficient, in any case, to aver, generally, that the vendors cannot procure a title by the time the conveyance should be made, we need not decide; for we think, in the case at bar, the facts should be set forth, and let the Court judge as to the conclusion which should be arrived at in reference to that point, for the reason that the possession of the land is impliedly admitted by the pleadings, to have passed from the vendors to the defendant. This might eventually ripen into a perfect title.

We are, therefore, of opinion that the demurrer to the answer was properly sustained.

Per Curiam.—The judgment is affirmed with 5 per cent damages and costs.

R. Lake and W. R. Pierce, for the appellant.

J. Davis, for the appellee.

TRACY v. KAUFMAN and Others.

Wednesday,
December 7.

APPEAL from the *Grant* Circuit Court.

Per Curiam.—In this case, all the exceptions, upon which available errors might have been assigned, are contained in a bill of exceptions that appears by the record to have

been filed more than three months after the decision of the case. No time appears to have been given to file such bill. There is nothing before us in the case.

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V.
THE STATE.

The judgment is affirmed with 5 per cent. damages and costs.

A. Steel and *H. D. Thompson*, for the appellant.

J. Brownlee and *H. S. Kelly*, for the appellees.

13	357
165	161

TOWNSEND v. THE STATE on the relation of HOSHOUB.

Prosecution for bastardy. On the cross-examination of the relatrix, the defendant propounded to her the following interrogatory: "Did you ever, at any time prior to the time you say you were begotten with child by the defendant, have sexual intercourse with any one?" This question was objected to, and the objection sustained. *Held*, that there was no error.

The defendant, as one of the grounds of his motion for a new trial, filed his affidavit stating that since the trial he had discovered evidence material to his defense; that he can prove by *T.* that the grandmother of the complaining witness was at his house but once during the said month of *February*, and that was on the 27th and 28th days; that this was material, because the prosecuting witness swore positively that the child was begotten at the time her grandmother was at the house of *T.*; and that he can prove, and did prove on the trial, that he was not at the house of the prosecuting witness at the time above mentioned; that he did not know what *T.* would swear until the day after the trial, nor could he have known that it would be material on the trial to make such proof; that he never had intercourse with the prosecuting witness, and is not the father of the child. He also introduced the affidavit of *T.*, stating in substance that the grandmother of the prosecuting witness was not at his house in said month of *February*, except on the 27th and 28th days, which were *Friday* and *Saturday*. *Held*, that these affidavits were insufficient to authorize a new trial.

APPEAL from the *Decatur* Circuit Court.

Wednesday,
December 7.

WORDEN, J.—Prosecution for bastardy. Trial, conviction, motion for a new trial overruled, and judgment. The defendant appeals to this Court.

On the cross-examination of the relatrix, the defendant propounded to her the following interrogatory:

"Did you ever, at any time prior to the time you say you were begotten with child by the defendant, have sexual intercourse with any one?"

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1859.

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v.
THE STATE.

This question was objected to, and the objection sustained. It is not claimed that this question should have been answered for the purpose of showing that some person other than the defendant might have been the father of the child. It is admitted by counsel, for the appellant, that for this purpose the question was too general, not being confined to the proper period of time. But it is insisted that, as a physiological fact, pregnancy seldom occurs from the first intercourse, the witness should have been compelled to answer the question, in order that the jury might judge correctly touching her credibility in case she should answer the question negatively.

We shall not inquire into the physiological proposition advanced, as we consider the question entirely irrelevant to the issue involved. The question before the jury was simply whether the defendant was the father of the bastard child with which the witness was pregnant. Whether she had or had not some time previously in her life had sexual connection, was entirely immaterial. We are not aware of any case where such a question has been permitted; on the contrary, the inquiry is always confined to a period of time that would render it not improbable that the person with whom such connection was had, might rightfully claim the paternity of the offspring. *Vide* 1 Greenl. Ev., § 458, note 1. This question has already been virtually decided by this Court.

In *Walker v. The State*, 6 Blackf. 1, it is said: "The defendant asked a witness what she had heard the complainant say, if anything, about the complainant having had sexual intercourse with any other person than the defendant, at any other time than about the time the child was said to have been begotten. This question was irrelevant, and, being objected to, was rightly overruled."

There was no error in the above ruling of the Court.

The evidence adduced upon the trial is not in the record, but the examination of the prosecuting witness before the magistrate is a part of the record, from which it appears that on such examination she testified that the defendant begot her with child on a *Saturday* in the month of *February*,

1857, from the middle to the last of the month—thinks it was near the last of the month—at the house of her grandmother, and while her grandmother was gone to one *Tanner's*.

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1859.

TOWNSEND
V.
THE STATE.

The defendant, as one of the grounds of his motion for a new trial, filed his affidavit stating that since the trial he had discovered evidence material to his defense; that he can prove by *Franklin Tanner* that the grandmother of the complaining witness was at his house but once during the said month of *February*, and that was on the 27th and 28th days; that this was material, because the prosecuting witness swore positively that the child was begotten at the time her grandmother was at the house of Mr. *Tanner*; and that he can prove, and did prove on the trial, that he was not at the house of the prosecuting witness at the time above mentioned; that he did not know what *Tanner* would swear until the day after the trial, nor could he have known that it would be material on the trial to make such proof; that he never had intercourse with the prosecuting witness, and is not the father of the child. He also introduced the affidavit of *Franklin Tanner*, stating, in substance, that the grandmother of the prosecuting witness was not at his house in said month of *February*, except on the 27th and 28th days, which were *Friday* and *Saturday*.

These affidavits, in our opinion, were entirely insufficient to authorize a new trial. Admit the main fact set forth in the affidavits to be true, viz., that the grandmother of the relatrix was only at the house of *Tanner* on the 27th and 28th days of *February*, and that the relatrix swore on the trial that the child was begotten at the time when her grandmother was thus at the house of *Tanner*. These facts have no tendency to show that the defendant was not at that time at the house of the relatrix or her grandmother, and that, therefore, he did not beget the child. To be sure he says, in his affidavit, that he can prove and did prove on the trial that he was not there at the time mentioned; but he does not even profess to have discovered any new evidence on that subject. We cannot see what bearing the facts alleged to have been discovered would have

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v.
THE STATE.

in the case, as the evidence adduced upon the trial is not before us; and the fact that the evidence is not set out, has already been held a sufficient reason for overruling a motion for a new trial on the ground of newly discovered testimony. *Swift v. Wakeman*, 9 Ind. R. 552.

Again, we think no sufficient diligence is shown. The defendant says he did not know what *Tanner* would swear until after the trial; but no reason is shown why he could not have ascertained. But he says he could not have known that it would be material to make the proof. If such proof was material, we think the defendant, by the exercise of ordinary diligence, might have discovered its materiality. The examination before the magistrate, fixing the time and place of the begetting of the child, and the fact that the grandmother of the witness was at the house of *Tanner*, was abundantly sufficient to indicate to the defendant the necessity of inquiring into the matters set up in his affidavit, if they were material to his defense.

The above are the only points relied upon to reverse the judgment, and they are insufficient.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. S. Scobey and *W. Cumback*, for the appellant.

J. Gavin and *O. B. Hord*, for the state.

TRITTIPO v. THE STATE.

Prosecution in the Common Pleas for a riot. The evidence showing that the defendant had been convicted for the identical riot, before a justice of the peace, it was held, that the prosecution in the Common Pleas would not lie.

Wednesday,
December 7.

APPEAL from the *Hancock* Court of Common Pleas.

WORDEN, J.—Prosecution by the state against the appellant, for a riot. Trial, conviction, and judgment, a motion for a new trial having been overruled.

The case is before us on the evidence. The riot proven against the defendant, was committed by him and others at the house of one *Thomas Alvey*, on the 1st of *January*, 1857, where, through the day, there was a chopping and sewing frolic, and a dance in the evening. In the evening the defendant and others, being uninvited, came and perpetrated the riot.

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1859.

TRITTIPO
V.
THE STATE.

On the trial, it appeared by the oral evidence, and the docket of one *Joseph Wright*, a justice of the peace of *Hancock* county, that on the 9th of *January*, 1857 (and before this prosecution was instituted), an affidavit was made by one *Daniel Myers*, before said justice, charging the defendant and others with the commission of a riot on said 1st of *January*, 1857, whereupon said justice issued his warrant for the arrest of the defendant and others, who were duly arrested and brought before the justice, and the defendant pleaded guilty to the charge, and was fined by the justice in the sum of five dollars.

It appears by the testimony of the justice, that the riot for which the defendant was fined before him, was the identical riot for which the defendant was on trial. It appears that on the trial before the justice, neither the *Alveys* nor any of the invited guests at *Alveys* were present, but others who were at *Alveys* uninvited, were present at the trial.

It is insisted that the prosecution before the justice was a bar to this prosecution. No objection to the validity of the prosecution before the justice has been pointed out, and we do not perceive any. It was an offense over which the justice had jurisdiction, and the proceeding seems to have been regularly instituted, by the filing of an affidavit, the issuing of a warrant, and the arrest of the defendant. We presume the prosecution before the justice was disregarded below, because neither the *Alveys*, nor the invited guests at their house, upon whom the riot was committed, were present at the trial. It was not necessary, under our present statute, that they should have been present, or that they should have been subpoenaed, in order to give the justice jurisdiction, and authorize him legally to hear and deter-

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1859.

MARBLE
V.
THE STATE.

mine the cause. The provisions on this subject, in the statutes of 1838 (R. S. 1838, p. 362, § 10), and in the statutes of 1843 (R. S. 1843, p. 1005, § 16), are not contained in our present code, regulating the jurisdiction and duties of justices in criminal cases.

We are of opinion that the prosecution before the justice, if it was for the same offense, was a bar to this prosecution; and the evidence shows that it was for the same offense, the testimony showing this fact being un rebutted.

The motion for a new trial should have prevailed.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

D. Moss and E. S. Stone, for the appellant.

13 362
170 127

13 332
171 4

MARBLE v. THE STATE.

Information for usury as follows: That *A.*, on, &c., at, &c., did then and there unlawfully bargain for a greater rate of interest, &c. *Held*, that this is sufficient without the use of the words *corruptly* and *usuriously*.

The information also alleged that said *B.* did then and there loan from the said *A.*, &c., instead of saying that said *A.* did then and there loan to the said *B.* *Held*, that this was not a substantial defect.

Wednesday,
December 7.

APPEAL from the *Gibson* Court of Common Pleas.

DAVISON, J.—Prosecution against *Painter Marble* for usury. The information charges “that *Marble*, on, &c., at, &c., did then and there unlawfully bargain for a greater rate of interest than was then or now is allowed by law, with one *John M. Boren*; to-wit, the said *Boren* did then and there loan for the space of one year, from the said *Marble*, the sum of 1,000 dollars, for the use and forbearance of which, for the term of one year, the said *Boren* made an agreement with said *Marble* to pay to him, *Marble*, 10 per cent. interest, or 100 dollars—exceeding the

legal rate of interest 4 per cent., or 40 dollars—being unlawful and usurious interest; contrary," &c.

Nov. Term,
1859.

Motion to quash the information overruled. Plea, not guilty. Finding and judgment for the state.

MARBLE
v.
THE STATE.

An objection is raised to the information, "because it fails to allege that the illegal interest was corruptly and usuriously taken." The lawful rate of interest is 6 per cent. per annum. 1 R. S. p. 343. And the statute upon which the information is predicated is as follows:

"Any person who shall directly or indirectly bargain for, receive, or reserve, on any contract or agreement whatever, a greater rate of interest than at the time is allowed by law, shall be fined in five times the interest so unlawfully bargained for, taken, or reserved," &c. 2 R. S. p. 440, § 51.

Thus it will be seen that the statute defining the offense of usury, does not use the terms "corruptly and usuriously," or either of them. And the general rule is, that "the description of the offense in an indictment in the language of the statute defining it, is sufficient." *The State v. Bougher*, 3 Blackf. 307.

The rule thus stated seems to be alike applicable to informations under the code of criminal procedure now in force; and though there are exceptions to it, none of them apply to the offense defined in the statute before us. Here the information avers "that the defendant, on, &c., at, &c., did unlawfully bargain for a greater rate of interest than was then, or is now, allowed by law," &c. This, in our judgment, brings the offense within the statute, and sufficiently alleges the defendant's criminal intent in bargaining for the illegal interest. As we have seen, the information, in stating the illegal bargain, avers that "the said *Boren* did then and there loan from the said *Marble* the sum of 1,000 dollars, for the use and forbearance of which for the term of one year, the said *Boren* made an agreement with said *Marble* to pay him, *Marble*, 10 per cent.," &c. This averment, it is insisted, does not sufficiently charge the defendant with having done the act of loaning the money. We think otherwise. In point of form, it

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1859.

LITTLE
V.
THE CITY
OF INDIAN-
APOLIS.

would, perhaps, have been more appropriate to have alleged that *Marble* did then and there loan to *Boren*. Still the information as it stands, is sufficiently explicit, and is not substantially defective.

Per Curiam.—The judgment is affirmed with costs.

A. C. Donald, for the appellant.

VANSVOORST v. VANSKOY.

Wednesday,
December 7.

APPEAL from the *White* Circuit Court.

Per Curiam.—This case was submitted at the *November* term, 1858, of this Court. No brief has been filed by the appellant. The errors assigned on the record will, therefore, be considered waived. See rule 28 of the Supreme Court; Perk. Pr. 722. The judgment must be affirmed.

The judgment is affirmed with 7 per cent. damages and costs.

D. Mace and *J. L. Miller*, for the appellant.

S. A. Huff, *D. Turpie*, and *R. Jones*, for the appellee.

LITTLE v. THE CITY OF INDIANAPOLIS.

Where a witness testified that a certain paper was in the city clerk's office, and the city clerk testified that he had made a thorough search for it in his office, where he supposed it would be likely to be found, and could not find it, it was held that a copy of the paper might be given in evidence.

Wednesday,
December 7.

APPEAL from the *Marion* Court of Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, instituted this suit against *Little*, before a justice of the peace, to recover of him his proportion of the cost of the work done in grading and graveling *East* street, between *Wash-*

ington and *Market* streets, in said city, on a contract under § 62 of an act incorporating cities, approved *June* 18, 1852. From the decision of the justice there was an appeal. In the Common Pleas, the issues were submitted to a jury, who found for the plaintiff; and the Court, having refused a new trial, rendered judgment, &c.

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1859.

LITTLE
V.
THE CITY
OF INDIAN-
APOLIS.

The act referred to provides that "when the owners of two-thirds of the whole line of lots bordering on any street in any city shall petition the mayor and common council to have such street graded," &c., "the mayor and council shall cause the same to be done by contract given to the best bidder," &c.; and "the cost thereof shall be estimated according to the whole length of the street per running foot, and the owners of the lots bordering on the street to be improved shall be liable for their proportion of the cost, in proportion to the length of the lots bordering thereon and owned by them." 1 R. S. p. 217, §§ 62, 63.

During the trial, the plaintiff, having suggested that the original petition to the city council for the improvement of *East* street, between the above points, was lost, produced one *George West*, who testified substantially as follows: "I was city clerk of said city since *May*, 1856. All the papers and records of the city council, since I became clerk, and treasury books to the year 1840, of which I have any knowledge, are in my possession. The petitions for the improvement of streets, and other matters, are filed in my office since I became clerk. I suppose this was the practice before I became clerk, as I find some such papers on file; but of this fact I have no personal knowledge. There are other offices in connection with the city council wherein papers are kept in connection with the doings of the city council; but there is no office, other than the clerk's office, that I know of, in connection with the council, where petitions for street improvements are kept. I have made a thorough examination for the petition in question among all the papers in my office, where I supposed the same would likely be, and could not find it."

N. B. Taylor, a witness, testified that he was city attorney, from *May*, 1853, till *May*, 1856; that he got said peti-

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1859.

THE OHIO
AND MISSISSIPPI RAIL-
ROAD Co.
v.
TINDALL.

tion from the files of the clerk's office of the city council, to have it before the justice on the trial of this cause. It remained there till after he decided the same, and witness returned it to the clerk's office of the city council.

Upon this testimony, *Little* moved the Court to allow him to give in evidence a copy of the petition as copied in the proceedings of the city council, relative to the aforesaid improvements of *East* street, to the introduction of which the defendant objected, on the ground that the absence of the original petition was not sufficiently accounted for; but the objection was overruled, and the proceedings of the council containing the copy admitted, &c.

The objection to the admission of the secondary evidence was not well taken. One witness proves that the original petition was in the clerk's office of the city council; and another, the clerk, who had control of that office, testifies that he had made a thorough examination for the petition in his office, where he supposed it would likely be, and could not find it. This, it seems to us, was sufficient to satisfy the Court that a fair, honest, and reasonably diligent attempt had been made to obtain the petition, without success. 2 Phil. Ev. (4 Am. ed.) 564, *et seq.*

As no further exception appears to have been taken to the ruling of the Common Pleas, the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

R. L. Walpole, for the appellant.



13	366
128	488
13	365
130	326
13	368
132	201
13	366
134	641
13	366
152	418
13	366
159	87
13	368
162	90
	72

THE OHIO AND MISSISSIPPI RAILROAD COMPANY v. TIN-

DALL.

An infant without an appointed guardian, and without an estate of inheritance, living in the family of his mother, a widow, is subject to her control, as his

natural guardian, and she is entitled to his wages; and where such an infant, while in the employ of a railroad company, was killed by a train, through the negligence of their agent, it was *held*, that an action would lie in the mother's name, for damages. But, *held*, also, that as such guardian, the mother could not, it seems, assume the custody of any separate estate the son might possess.

Section 27, 2 R. S. p. 33, authorizing such an action, is not repealed by § 784, *id.* p. 205. The latter section applies to adults, the former to infants.

A railroad company are not liable, so far as the simple question of negligence is concerned, to the parents, guardians, or representatives of a servant killed upon the road, where they would not have been liable to such person, had he been injured, simply, and not killed.

An employer is not liable to one employè for an injury occasioned by another engaged in the same general undertaking.

A set of hands were at work for a railroad company gravelling a part of the track. The gravel was conveyed from the pit to the place where it was used, by a train of cars. The same hands loaded and unloaded the gravel, and rode back and forth upon the cars from the places of loading and discharging. While thus employed, the train, through the alleged carelessness of the engineer, ran against an ox, was thrown off the track, and one of the hands, a young man under age, killed. *Held*, that the engineer and the deceased were engaged in the same general undertaking, and the representative of the deceased could not recover damages.

This case is distinguishable from *Fitzpatrick v. The New Albany, &c., Railroad Co.*, 7 Ind. R. 436, and does not impair the force of that case.

In this case, the Court instructed the jury that, in estimating the damages, they might take into consideration the actual pecuniary loss to the plaintiff occasioned by the death of the son and servant, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness. *Held*, that this was error.

APPEAL from the *Martin* Circuit Court.

PERKINS, J.—Suit by *Margaretta Tindall*, mother of *Daniel Tindall*, deceased, a minor, against the *Ohio and Mississippi Railroad Company*, to recover damages for the loss of the life of said *Daniel*, he having been killed by an engine of said company, running upon the road.

The general denial was pleaded, upon which the cause was tried, and the plaintiff had judgment for 2,000 dollars.

The facts in the case are these:

A set of hands were at work for the *Ohio and Mississippi Railroad Company*, gravelling a portion of the track. The gravel was conveyed from the pit to the place where it was used upon the road, by means of a train of gravel

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cars. The same hands appear to have loaded and unloaded the cars, and to have ridden back and forth between the places of loading and unloading, upon them. While thus employed, the train, through, as is claimed, the carelessness of the engineer, ran against an ox, was thrown off the track and *Tindall* killed upon the spot. He was a single man, about eighteen years of age, and lived with his mother, who received the benefit of his wages in the support of her family. —The father of the son, and husband of his mother, was dead. The son does not appear to have had any estate of inheritance out of which he might have been supported, nor to have had an appointed guardian.

The first question raised upon these facts relates to the right of the mother to sue.

We think the action maintainable in her name. She was the natural guardian of her infant son, after the death of his father, and as such, had the control of his person; and, as he remained a member of her family, she had a right to his wages. Damage, therefore, accrued to her by his death. But, as his natural guardian, it may be remarked, she could not, probably, have assumed the custody of any separate estate he might have possessed. Reeve's Dom. Rel. 319.—Will. on Exec., p. 443. Section 27, p. 33, of the code (vol. 2), expressly authorizes the mother to sue in a case like the present. But it is asserted that that section is repealed by a later and repugnant section, to-wit, § 784, p. 205, of the same volume of the code. This latter section provides that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may sue, in a case where such person might have sued for the wrongful act or omission, had it not caused death.

These two statutes may be reconciled and given effect to, by holding the latter applicable to the cases of adults, and the former to those of infants.

The second question raised, involves the liability of the company upon the facts.

The company is not liable, so far as the simple question

of negligence is concerned, to the parents, guardians, or representatives of a deceased servant, killed upon the road, where they would not have been liable to such person, had he been injured simply, and not killed. And the general legal proposition, that an employer is not liable to one employè for injury occasioned by another engaged in the same general undertaking, has been judicially asserted by this Court. *The Madison, &c., Railroad Co. v. Bacon*, 6 Ind. R. 205. And it is firmly established as a principle of the common law. Redf. on Railw., 1st ed., 386.—2 Hill on Torts, 563.—*Potts v. Blunket*, in the Queen's Bench of *Ireland*, 7 Am. Law Reg. 555.

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But when are employès to be considered as engaged in the same general undertaking? This is now the difficult question in this class of cases; and no answer to it, in general terms, embracing a definition applicable as a test to all states of fact, has as yet, so far as we are advised, been attempted; nor shall we now attempt one. Each case has thus far been determined upon its own particular facts, and as that at bar falls exactly within one of them, it may be rested upon it.

That case is *Gillshannon v. The Stony Brook Railroad Corp.*, 10 Cush. 228. The facts in the case were, that an employè of the company was riding to his place of labor upon the gravel train, by permission of, but not under any special contract with the company, and, while so riding, was thrown from the train and injured by a collision caused by the carelessness of those in the management of the train. It was the unanimous decision of the Supreme Court of *Massachusetts*, that no recovery could be had against the company for the injury. This case is supported by the Supreme Court of *Ohio* in *Whaalan v. The Mad River Railroad Co.*, 8 Ohio St. R. 249; and by the the Court of appeals in *New York*, in *Boldt v. The New York Central Railroad Co.*, 18 N. Y. R. (4 Smith) 432.

It may be observed that the case at bar is clearly distinguishable from that of *Fitzpatrick v. The New Albany, &c., Railroad Co.*, 7 Ind. R. 436, and is not regarded as impairing its force.

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The third question raised, relates to the damages.

The Court instructed the jury that in estimating the damages, they might take into consideration the actual pecuniary loss to the plaintiff, occasioned by the death of the son and servant, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness.

This instruction was erroneous. See *Quin v. Moore*, 15 N. Y. Court of App. 432.

In a late case very similar to the one now before us, the authorities on this point are collected and reviewed, and the following rule deduced by the Supreme Court of *Pennsylvania*. The Court say:

“From the authorities and reasons given, the jury, instead of the unrestrained license given them in the charge, in the assessment of damages, should have been instructed that if the plaintiffs were entitled to recover, it was for the damage done in producing the death of their son, and this was to be estimated by the pecuniary value to them of his services during his minority, together with expenses of care and attention to the deceased, arising out of the injury, funeral expenses, and medical services, if any.” “In making the estimate of the value of the life, and consequent damage by the death, much is still left to the sound discretion of the jury. Whatever is susceptible of pecuniary estimate, is included within it, and what we have seen was not to be included must be excluded.”

The Court concede, however, that where the negligence is accompanied by anything showing moral turpitude, in addition to mere negligence, vindictive damages may be added to such as are simply compensatory; but as to this point we do not wish to be understood as intimating an opinion.

In speaking of damages for mental anguish, the affliction of the death, the Court say: “No money could be the measure of the affliction; no road, great or small, but would fall beneath the weight of such a rule, if applied” to injuries happening through simple oversights, amounting, it is true, to negligence, but negligence uncombined with inten-

tional wrong. *The Pennsylvania Railroad Co. v. Zebe*, 33 Penn. St. R. (9 Casey) 318.—S. C., Am. Law Reg., vol. 8, p. 27. Nov. Term,
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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c. HALL
v.
WHEELER.

J. Baker and *S. Judah*, for the appellants.

M. C. Hunter, *I. S. Hunter*, *E. Dumont*, and *O. B. Torbet*, for the appellee.

HALL and Others v. WHEELER.

A voluntary assignment contained this clause: "4th. To pay such other debts as we may hereafter specify, out of any surplus which may be left, after paying all the claims and debts in this deed of assignment first described." *Held*, that this provision did not render the assignment void, *per se*.

Whether or not there has been a delivery of possession under an assignment, is a question for the jury.

To constitute such delivery, a removal of the goods from the building in which they were assigned, is not necessary.

And it is not necessary that the assignor should be permanently excluded from the possession. He might act as the agent of the assignee. The circumstance would not be conclusive of fraud.

APPEAL from the *Vanderburgh* Court of Common Pleas. Friday,
December 9.

PERKINS, J.—About the first of *December*, 1857, *Woolsey* and *Nelson* made a voluntary assignment of their property, fairly valued at about 2,600 dollars, to *Horatio Q. Wheeler*, in trust to pay certain preferred debts amounting to about 2,500 dollars.

About the middle of *December*, 1857, *Gass & Co.* recovered a judgment against *Woolsey* and *Nelson*, caused execution to be issued upon it, and the goods assigned to *Wheeler* to be seized, as the property of *Woolsey* and *Nelson* to satisfy it.

Wheeler brought an action to recover possession of the

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goods. Issues were formed in the case, tried by a jury, and *Wheeler* recovered the goods.

The appellants insist that the assignment was void upon its face, because it contained this clause:

"4. To pay such other debts as we may hereafter specify, out of any surplus which may be left after paying all the claims and debts in this deed of assignment first described."

We do not think this provision made the assignment void *per se*. Ind. Dig. 144. See, as to voluntary assignments hereafter, Acts of 1859, p. 239.

It is further insisted that the assignment was void, because the deed of assignment was not recorded, and possession of the property assigned delivered. The deed does not appear to have been recorded; but whether there was a *bona fide* delivery of possession or not, was a question properly left to the jury, and they found that there was such.

There is some evidence tending to support the finding, and we cannot disturb the judgment of the Court below in refusing to set the finding aside.

It was not necessary that there should be a removal of the goods from the building in which they were at the time of assignment, to constitute a delivery of possession. The delivery might be made in that building. Burr. on Assign. 327.

So, it was not necessary that the assignors should be permanently excluded from the possession. They might be permitted to act as the agents of the assignee. The circumstance might excite suspicion, but not conclusively prove fraud. It would be a question of notoriety and good faith. Burr. on Assign., *supra*.

Per Curiam.—The judgment is affirmed with costs.

J. J. Chandler and *J. B. Hynes*, for the appellants.

A. L. Robinson, for the appellee.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
POWELL.

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THE NEW
ALBANY, &C.,
RAILROAD CO.

v.
POWELL.

Where the summons commanded the officer to summon the *New Albany, &c., Railroad Company*, and the return was, "served as commanded, by copy given to conductor *P.*, conductor on express train," it was *held*, in a suit for killing stock, brought under the statute of 1853, that service was sufficiently shown.

Where no affidavit for a continuance appears in the record, the refusal of a continuance cannot be held error on appeal.

APPEAL from the *Pulaski* Circuit Court.

Friday,
December 9.

HANNA, J.—This was a suit commenced before a justice of the peace, by *Powell* against the appellants, for damages for animals killed by the cars, &c., of the said appellants, where there was judgment for the plaintiff, and also in the Circuit Court on appeal.

The errors assigned are—

1. That the Circuit Court should have sustained the motion of the defendant to dismiss the cause.

The record shows that this motion was placed upon the ground that there was not a sufficient service; that a summons issued to any constable, &c., commanding him to summon the "*New Albany and Salem Railroad Company*, their agent, or attorney," &c.; and the return is, "served as commanded by copy given to conductor *Putnam*, conductor on express train."

Without stopping to inquire whether the motion made would reach a defect in the service, if such existed, we are of opinion the service is sufficiently shown, under the statute of 1853, p. 113. Same appellants v. *Grooms*, 9 Ind. R. 245.

It is insisted that the return should show that the person to whom the copy was delivered was, at that time, a conductor on a train passing through said county. Keeping in view the form of the command in the summons, we think the return does show that fact. It was served as commanded on a conductor—the conductor of an express train.

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v.
SALMON.

2. The Court should have sustained the motion of defendants to continue, &c.

There is no affidavit in the record in support of the motion. Without a proper affidavit, the ruling of the Court was right.

The other two reasons assigned, are based upon the ruling of the Court on the motion for a new trial, &c., and have reference to the evidence, &c. The record does not profess to contain all the evidence, and we cannot, therefore, determine the points attempted to be made.

So far as any other questions are raised in the case, they have been already settled in the case of the same appellants v. *Tilton*, 12 Ind. R. 3, and the same v. *Maiden*, *id.* 10.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

W. G. Cooper, for the appellants.

D. D. Pratt, for the appellee.

BOFANDICK v. SALMON.

Friday,
December 9.

APPEAL from the *Vanderburgh* Court of Common Pleas.

HANNA, J.—Proceedings by plaintiff to enjoin defendant from collecting a sum claimed to be due, as evidenced by a due bill held by said defendant.

It is averred that the due bill was given for money borrowed by plaintiff of defendant; that afterwards a promissory note was executed for the same money, but the due bill was not taken up; that the note was paid.

The defendant answered, denying the payment of the due bill. Trial by the Court; finding for the defendant.

The evidence is in the record, and, it is insisted, does not sustain the finding.

We have carefully examined and considered the evi-

dence, and are of opinion a new trial should have been granted.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

WINDSOR
v.
THE STATE.

A. Iglehart and *M. R. Anthes*, for the appellant.

M. F. Johnson, for the appellee.

WINDSOR v. THE STATE.

A criminal prosecution is not a proper mode of trying title to real estate.

A person without color of title could not defeat a criminal prosecution, for malicious trespass upon lands, by setting up title in himself; but where he has a paper title apparently valid on its face, and claims in good faith to be owner, and is in possession, by himself or by another occupying by his direction, a prosecution for a malicious trespass to the damage of a third person, will not lie, although such person, in the end, prove to have the better title.

APPEAL from the *Dubois* Court of Common Pleas.

Friday,
December 9.

WORDEN, J.—Prosecution against *Windsor* for a malicious trespass committed by him, as was alleged, upon a dwelling house belonging to the “trustees, in trust for the *Methodist Episcopal Church* of the *Indiana Annual Conference*.”

Trial by the Court; conviction and judgment, a motion for a new trial having been overruled.

It appears by the evidence, all of which is set out, that at the time the trespass was committed, one *Lindsey Elkins* was in possession of the property by the direction of the defendant, but was about moving out, and had moved a part of his household furniture; and one *Sarah Jane Cone* was about moving into the house, or perhaps had moved in, by the authority of the trustees of the church. The defendant claimed the property as his own, and removed the doors, and otherwise injured the house, saying that he was going to move it away. In *March*, 1848, one *Samuel Winegar* and wife conveyed the land on which the

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house stood, to the trustees of the church, but at what time the deed was recorded does not appear. The land thus conveyed was a small piece estimated to contain three acres and a half out of a certain tract. Afterwards, in *September, 1852*, the said *Winegar* and wife conveyed the whole of said tract, without exception or reservation, to said *Lindsey Elkins*, and in *December, 1854*, *Elkins* and wife conveyed the above tract to the defendant. The defendant thus had a paper title to the premises, derived from the same source as that held by the trustees. It may have been a valid title, for it does not appear at what time the deed to the trustees was recorded, nor was there any evidence showing that either *Elkins* or the defendant had notice thereof before receiving their respective conveyances. The house appears to have been in the possession of the defendant, as *Elkins* was occupying it by his direction.

The question arises whether, under these circumstances, the defendant can be held responsible criminally, for a trespass committed upon the house. We think not.

In *Howe v. The State*, 10 Ind. R. 492, it was decided that a man cannot be held criminally responsible for destroying timber upon lands of which he holds the possession by virtue of a contract obtained by fraud.

We do not think a criminal prosecution a proper mode of trying the title to real estate.

A person without color of title, could not defeat a criminal prosecution for malicious trespass upon lands, by setting up a title thereto in himself; but where he has a paper title, apparently valid on its face, and claims, in good faith, to be the owner, and is in possession, either by himself or others occupying by his direction, he cannot be prosecuted criminally for a trespass committed thereon by him, to the damage of a third person, although such third person, in the end, may prove to have the better title.

The motion for a new trial should have prevailed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. J. Simpson, for the appellant.

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RODMAN and Others v. KELLY.

RODMAN
v.
KELLY.

Section 71, 2 R. S. p. 464, authorizes an action before a justice of the peace to recover possession of personal property taken by attachment issued from the Common Pleas, against a person other than the plaintiff, where the value of the property is not more than 100 dollars.

A notice to take depositions "in the office of the clerk of *Marshall* county, in the state of *Illinois*," is too vague as to place; but where the deposition was not in the record, nor shown to have been read upon the trial, and the Supreme Court had no means of determining its character, it was *held* that the error was not sufficient to reverse the judgment.

APPEAL from the *Boone* Circuit Court.Friday,
December 9.

WORDEN, J.—This was an action for the possession of certain articles of personal property, brought by the appellee against the appellants, before a justice of the peace.

On appeal to the Circuit Court, the defendants moved to dismiss the cause for want of jurisdiction in the justice. The motion was overruled and exception taken.

Trial by the Court; finding and judgment for the plaintiff below. New trial moved, on the ground that the Court improperly overruled a motion to suppress a deposition taken by the plaintiff.

The ground of the motion to dismiss the cause, was that the property was taken by the defendant, *Rodman*, as the sheriff of *Boone* county, by virtue of a writ of attachment issued from the *Boone* Common Pleas against one *Joseph Kelly*, at the suit of the other defendants, as the property of said *Joseph Kelly*. It is insisted that in such case, a justice of the peace has no jurisdiction.

If this were a proceeding under the provisions of the statute "authorizing proceedings to try the right of property seized by virtue of any writ of execution or attachment," &c. (2 R. S. p. 493), the objection would probably be well taken, as that statute contemplates such proceedings before a justice only in cases where the property has been seized by virtue of process issued by a justice. *Matlock v. Strange*, 8 Ind. R. 57. It is insisted that the foregoing statute is the only one giving justices jurisdiction in cases where property has been seized by execu-

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BODMAN
v.
KELLY.

tion, &c., and as he has no jurisdiction under this statute where the property was seized by process issued from the Common Pleas, therefore, the proceeding before the justice was without authority, and void.

This suit was instituted under the provisions of § 71, 2 R. S. p. 464, which, in our opinion, clearly authorizes it. Under this latter statute, a plaintiff may, in all cases, proceed before a justice where his personal property, not exceeding in value 100 dollars, has been wrongfully taken or unlawfully detained by any other person, where "the same has not been taken by virtue of any execution or other writ against him."

A party, where his property has been seized by virtue of an execution or attachment against another person, is not confined to the remedy provided on page 493 of the code, but may proceed to replevy the same under the other provisions of the statute.

The motion to dismiss the cause was correctly overruled.

The motion to suppress the deposition was based upon alleged insufficiency of the notice in respect to the place where the same was to be taken. The notice specified that the depositions were to be taken "in the office of the clerk of the Circuit and District Court of *Marshall* county, in the state of *Illinois*." This notice is vague and unsatisfactory as to place. A person in *Indiana* could not, perhaps, be presumed to know at what particular town or place the clerk of a Court in another state kept his office. If the place is fixed by a law of *Illinois*, still a person here would not be bound, nor would he be expected, to notice the law of another state. But still, admitting the notice to be insufficient, we think the error is not sufficient to reverse the judgment.

The deposition is not contained in the record, and we have no means of determining its character, or ascertaining whether there was anything in it that worked an injury to the defendants. The record does not even show that it was read on the trial of the cause at all. This question has, in principle, been already determined. Thus, in the

case of *Culbertson v. Stanley*, 6 Blackf. 67, an improper question was asked of a witness, and an objection to it overruled. It was held to be erroneous; but the Court say, as a reason why the error was not fatal, "the record does not contain the answer of the witness, nor inform us whether he answered the question at all or not, we do not know whether the defendant was injured by it or not." Again, in the case of *Jones v. Doe*, 1 Ind. R. 109, objection had been made to certain witnesses introduced. The Court say: "The record does not disclose what was stated by the witnesses objected to, and it is, therefore, impossible for this Court to determine what was the nature of the testimony given by them, or what influence it could have had upon the jury, if any."

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DAVIS
v.
PIKE.

So in the case at bar, we are not informed whether the deposition was read on the trial, or if read, there is nothing before us from which we can say that the defendants were injured thereby.

Per Curiam.—The judgment is affirmed with costs.

A. J. Boone, for the appellants.

T. J. Cason, for the appellee.



DAVIS and Another v. PIKE.

APPEAL from the *Hamilton* Court of Common Pleas. *Friday, December 9.*

Per Curiam.—The appellee, who was the plaintiff, sued the appellants, who were the defendants, upon a promissory note for the payment of 350 dollars, with interest from date. The note is dated *February 28, 1856*, and due at one year and ten months.

A summons was issued against the defendants, returnable on the second day of the *February* term, 1858, of said Court, which was returned, and by the return of the sheriff thereon appears to have been served at least ten days before the first day of said term of that Court. Afterwards,

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on the second day of said term, the defendants not appearing, they were regularly defaulted; and thereupon the cause was submitted to the Court, without the intervention of a jury, and the Court being fully advised, found for the plaintiff 390 dollars, 50 cents, upon which finding, judgment was rendered, &c.

The following are the errors assigned:

1. The record shows that there was a trial in the Court below, without any issue having been joined by the parties.

2. The damages assessed are excessive, and not warranted by the pleadings.

3. The summons issued against defendants in the Court below, was not made returnable to the first day of the next term, as required by law.

There is nothing in the assignment of errors, as applied to the case at bar. 2 R. S. p. 35, § 37.—*Id.*, p. 350.—Perk. Pr. 147.

The judgment is affirmed with 10 per cent. damages and costs.

E. S. Stone and *A. H. Conner*, for the appellants.

G. H. Voss, for the appellee.



Cook and Others v. Otto and Another.

Friday,
December 9.

APPEAL from the *Vanderburgh* Circuit Court.

Per Curiam.—The record shows that *Otto* and *Davis*, at the *April* term, 1858, of the *Vanderburgh* Circuit Court, recovered a judgment in that Court against the appellants, who were the defendants, and that afterwards, at the same term, the defendants, upon affidavit, moved for a new trial in the cause in which judgment was rendered, which motion the Court overruled. And from the decision of the Court in overruling said motion, the defendants took this appeal.

The appeal thus taken must be dismissed. The statute does not authorize an appeal from an order of the Court refusing or granting a new trial, especially when such order is made at the term at which the cause in which such order was made was tried. The party, to avail himself of an error in refusing a motion for a new trial, must appeal from the final judgment in the cause to which his motion applies. 2 R. S. pp. 158, 162, §§ 550, 576.

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Rowe
v.
Buchtel.

The appeal is dismissed with costs.

C. Denby and *J. Lunkenheimer*, for the appellants.

C. Baker, for the appellees.

ROWE v. BUCHEL.

APPEAL from the *St. Joseph* Court of Common Pleas. *Saturday, December 10.*

PERKINS, J.—On the 1st of *April*, 1852, one *Bambarger* made his note, at *Elkhart, Indiana*, for 125 dollars, payable to *Rowe* on the 1st of *April*, 1853, and *Bambarger* executed said note with *Buchtel* as surety.

In *November*, 1856, *Buchtel* gave *Rowe* written notice to sue on the note. But *Bambarger* had then left the state, and he never returned to it, but died in *Ohio*. He left no property, and never had any administrator in *Indiana*.

Rowe did not commence suit against any one on the note, at the first term of the Court after receiving notice to sue; but at the second term thereafter, he sued *Buchtel*. *Buchtel* defended on the ground that he, himself, had not been sued at the first term after the notice, and his defense was held valid by the Court.

The Court erred in a very plain case. The notice to sue did not operate as a requirement to sue the surety. No suit against him was necessary to secure any rights against his principal. He could have paid the note at any

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v.
HUNGATE.

And the payee of the note was not bound, upon notice, to follow the principal out of the state. This is the rule as to diligence, on assigned notes. So such absence excuses a demand, in cases where a demand would otherwise be necessary.

The judgment is reversed with costs. Cause remanded, &c.

J. A. Liston, for the appellant.

H. C. Newcomb and *J. S. Tarkington*, for the appellee.

BELL and Another v. HUNGATE.

Where the plaintiff demurs to the answer, but, before the Court has determined the demurrer, replies thereto, he thereby waives his demurrer.

If the Court in charging the jury assumes a material fact, it usurps the prerogative of the jury, and the judgment may be reversed, although the evidence is not in the record.

Saturday,
December 10.

APPEAL from the *Orange* Court of Common Pleas.

HANNA, J.—*Hungate*, as assignee of *Kenly*, brought suit on a note executed by *Bell* and *Dougherty* to *Kenly*.

The answer, on its face, appears to be by but one of the defendants, but does not show which one it is. It is—

1. That the plaintiff is indebted to the defendant 150 dollars, for money had and received.

2. That plaintiff has obtained from him, by gaming with cards, 200 dollars unlawfully, and the defendant offers to set off, &c.

3. That plaintiff, before the commencement of the suit, received, for the use of this defendant, 200 dollars, money lost and paid to said *Hungate*.

4. That said *Bell* is the principal, and said *Dougherty* surety only, in said note.

There was a demurrer filed to the answer, which does not, by the record, appear to have been disposed of. Nov. Term,
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The plaintiff, for reply, filed a general denial. Trial by a jury; verdict and judgment for the plaintiff. BLACK
v.
DAGGY.

The plaintiff, by replying, waived his demurrer to the answer. Ind. Dig. 649.

The evidence is not all in the record.

The Court instructed the jury in such language as assumed the existence of certain facts, and that they had been proved, to-wit: That *Bell* was principal and *Dougherty* surety; that three years before the trial, the plaintiff won at cards of said *Bell* 100 dollars; that it was not necessary to inform the jury whether the money so won could be pleaded as a set-off or not, because six months had elapsed from the winning of the money before the note was assigned to the plaintiff; therefore, the defense was not available, and it was the duty of the jury to find for the plaintiff.

The Court, by assuming that the facts thus mentioned were proved, usurped the prerogative of the jury, namely, to determine whether the evidence sustained the issues made. The instructions were, therefore, wrong in form. But it is said that, the evidence not being in the record, we must presume in favor of the action of the Court. We do not think so, under the circumstances of this case.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. M. Donald and *A. G. Porter*, for the appellants.

J. Baker, for the appellee.

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The note of the clerk of the Court below upon the transcript, is no part of the record.

The Supreme Court will presume in favor of the legality of the proceedings below, where the contrary is not shown by the party complaining thereof.

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Where the record does not contain the evidence, the Supreme Court will presume in favor of the impropriety of an instruction, if any state of facts might have existed to which such instruction would have been applicable.

APPEAL from the *Putnam* Court of Common Pleas.

HANNA, J.—Suit on an account for money had and received, for money paid, laid out, &c., for work, labor, and materials, for goods, &c., and for balance due on settlement.

Answer, first, a general denial; second, by way of counterclaim, that plaintiff was indebted in the sum, &c., for balance due on pork delivered to plaintiff.

Reply, in denial.

The first error assigned is, in relation to the suppression of depositions. The record made by the clerk shows that on motion depositions were suppressed and the ruling excepted to; but there is no bill of exceptions informing us what depositions were so suppressed, nor for what cause. There is a bill of exceptions showing that the defendants read to the jury the parts of the depositions of *Isaiah Mansur* and *David Macy*, not heretofore suppressed. The bill of exceptions does not inform us what part was, and what was not suppressed. At the end of certain of the answers, the letter Q, is placed, and the letter O at the end of the balance. A note by the clerk is inserted, stating that Q denoted answers suppressed, and O, those not. This note cannot be regarded as any part of the record; nor does the additional statement of the clerk, that the bill of exceptions which was taken at the time of the suppression of the depositions, was lost, give any greater force to the said note. The record cannot be supplied in that mode.

The second error assigned is in striking out the testimony of said *Mansur* and *Macy*, and in directing the jury to discard the same.

In *Reese v. Beck*, 9 Ind. R. 239, in reference to the suppression of depositions, it was held, that the party complaining of a decision must show it to be wrong; and that in this Court the presumption is in favor of the action of the Court below. As the cause for the suppression of a

portion of the depositions of *Mansur* and *Macy* is not shown, we are left in the dark as to how far that motion affected the depositions as a whole, and, indulging the same presumption in favor of the further action of the Court, in striking out the balance of said depositions as irrelevant, we must conclude that the motion to suppress, for whatever cause entertained, was so entertained to all the parts of said depositions which otherwise would have been relevant to the issues then being tried, and consequently that the ruling on the motion to strike out, was right, for the reason that it is apparent that a part of the answers were irrelevant.

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The third, fourth, and fifth errors assigned, are based upon the rulings of the Court in giving and refusing instructions.

The evidence is not in the record.

Of the instructions given, only three were so excepted to as to enable us to examine the questions arising thereon. They are as follows:

“That if the jury believe from the evidence that the money advanced by plaintiff to defendants was procured from another, where a higher rate of interest than 6 per cent. is allowed, and that it was agreed between plaintiff and defendants, that such higher rate of interest should be paid for all moneys advanced by plaintiff to defendants in purchasing, slaughtering, packing, and shipping their pork, then such higher rate of interest should be allowed to the plaintiff by the jury.”

“If the jury believe from the evidence that the money used by the defendants, in purchasing, slaughtering, packing, and shipping their pork, was to be borrowed by plaintiff for them, in the state of *New York*; and that it was agreed between them, plaintiff and defendants, that the money would be subject to a charge of one and a half per cent. for commission; and that the money so borrowed by plaintiff for defendants, was chargeable with such commission, then the jury should allow such commission to plaintiff.”

“That if the parties meet together and employ a third party to cast up the accounts between them, and the ac-

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counts are examined by them *pro* and *con.*, and no objection made by either party, and the said third party casts up a balance against one of the settling parties, that balance is presumed to be correct *prima facie*."

As the evidence is not in the record, the only remaining error assigned, so far as it might be based upon the evidence, cannot be considered, namely, that the Court erred in refusing a new trial; therefore, the disposition of the questions arising upon the above-quoted instructions, will conclude our investigations.

In addition to the instructions above set forth, there was one given to the jury, to the effect, that interest at a greater rate than 6 per cent., was illegal in this state; and that charges of illegal commissions could not be recovered.

As to the third instruction above quoted, we cannot perceive any objection to it.

The other two instructions, when taken in connection with the fourth one alluded to, and given at the instance of the defendants, we think, presented to the jury the question of whether an arrangement or subterfuge had been resorted to, to avoid the usury laws of the state. The jury were told the rate of legal interest in this state, and as the evidence is not in the record, informing us of the state of facts to which the other instructions would apply, we must presume in favor of the action of the Court, if any state of facts might have existed making such instructions legal.

We are not prepared to say that the plaintiff might not have been acting under an agency or commission for the defendant, in obtaining for, and advancing money to him, for the purchase, &c., of hogs.

As before stated, the evidence is not before us, and, as such a state of facts might have been shown as would make the instructions correct, we must presume they were so shown.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

—— *Hathaway*, for the appellant.

—— *Williamson* and —— *Daggy*, for the appellees.

MARKS, Executor, &c., v. THE JUNCTION RAILROAD COMPANY.

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1859.

BOON
v.
WATSON.

Saturday,
December 10.

APPEAL from the *Fayette* Circuit Court.

Per Curiam.—The appellees sued the appellant on a subscription to the stock of the company, and recovered.

The same question is presented in the case as is decided in *McCray* v. the same appellee, 9 Ind. R. 358. The law, as decided in the case referred to, is with the appellant, and to that decision we adhere.

The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid and *S. Heron*, for the appellant.

S. W. Parker and *J. C. McIntosh*, for the appellees.

BOON and Another v. WATSON and Another.

APPEAL from the *Fayette* Circuit Court.

Saturday,
December 10.

WORDEN, J.—Suit by the appellees against the appellants, on a note made by the appellants to one *Robert M. C. Watson*, and by him endorsed to the plaintiffs.

Each of the defendants answered separately, setting up as a set-off an indebtedness due to himself from *Robert M. C. Watson*, accruing before the assignment of the note. Demurrer to the answer sustained, and exception. The ruling on the demurrers is the only matter complained of here.

The ruling below was right. The set-off pleaded, lacked the essential quality of mutuality. Each answer set up matters due to only one of the makers of the note, and in such case they cannot be set-off. *Reed* v. *Coale*, 4 Ind. R. 283.—*Johnson* v. *Kent*, 9 id. 252.

The statute authorizing the principal, in a note made by a principal and surety, to set up as an offset a claim due

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to himself from the payee, &c., does not apply here, as there is no averment that one of the makers is a principal, and the other a surety. For aught that appears, both makers of the note are principals. If one of the makers of the note were a principal, and the other his surety merely, whereby a debt due from the payee or holder to the principal, could be set-off, that fact should, in our opinion, be averred in the answer setting up the offset.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. S. Reid, for the appellants.

S. W. Parker and *J. C. McIntosh*, for the appellees.

LINDLEY v. DAKIN.

Where there was no motion below for a taxation of costs, it was *held*, that the Court not having been asked to make a ruling on the subject, there was nothing to complain of on appeal.

Where the record stated that it contained "all the testimony," it was *held*, that it could not be deemed to contain all the evidence.

Attornment is the acknowledgement by a tenant of a new landlord, on the alienation of land, and an agreement to become tenant of the purchaser.

Occupancy by a tenant, of property sold, where the fact and the title of the tenant are known at the time to the purchaser, is not a breach of the covenant of right of possession; and if no special contract is made, the occupant becomes tenant to the purchaser, and the possession of the tenant is the possession of the landlord.

But as the possession of real estate, within a certain statutory period, may be the subject-matter of a valid parol contract, it would seem, if such a contract was made between the purchaser and the seller, that a suit in relation to such possession, would necessarily have to rest upon a breach of the parol contract, and not upon the covenants of the deed.

Monday,
December 12.

APPEAL from the *Morgan* Circuit Court.

PERKINS, J.—Suit upon the covenants in a deed conveying real estate. Final judgment for the defendant.

It is urged, as one ground for the reversal of the judgment, that it wrongly embraces costs. But no motion for

a taxation of costs was made below; the Court was not asked to make a ruling upon the subject, and there is, consequently, none to be complained of here.

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v.
DAKIN.

Again, it is said the judgment is wrong upon the evidence. But the record does not purport to bring the evidence in the cause before this Court. It states that all the testimony is embodied in it. Testimony is not synonymous with evidence. It is but a species, a class, or kind of evidence. Testimony is the evidence given by witnesses. Evidence is whatever may be given to the jury as tending to prove a case. It includes the testimony of witnesses, documents, admissions of parties, &c.

The defendant answered to the breach of covenant as to possession, that at the time he sold the property to the plaintiff, it was in the possession of other persons; that the purchaser knew the fact at the time of his purchase, and the extent of their rights of possession; and that an agreement was made between the parties, that the seller was to give possession at a future time, when the then possessors could be removed.

The Court overruled a demurrer to this answer.

Pending the cause, the then possessors vacated the property, so that the possession came to the plaintiff. This fact was answered, *puis darien continuance*, and the answer held valid.

The revised code contains this provision:

“Sec. 7. A conveyance of real estate, or of any interest therein, by a landlord, shall be valid without the attornment of the tenant. But the payment of rent by the tenant to the grantor, at any time before notice of sale, given to said tenant, shall be good against the grantee.” 2 R. S. p. 243.

Attornment is the acknowledgement by a tenant of a new landlord, on the alienation of land, and an agreement to become tenant to the purchaser. Whart. Law Dic. 66. —1 Bouv. Law Dic. 151.

It thus appears that occupancy, by a tenant, of property sold, where the fact, and the title of the tenant are known at the time to the purchaser, is not a breach of the covenant of

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right of possession; and that, if no special contract is made, the occupant becomes tenant to the purchaser. The possession of the tenant is the possession of the landlord. But as the possession of real estate, within a certain statutory period, may be the subject-matter of a valid parol contract, it would seem, if such a contract was made between the purchaser and seller, that a suit, in relation to such possession, would necessarily have to rest upon a breach of such parol contract, and not upon the covenants of the deed. See *Gibson v. Eller*, at this term (1).

This shows that the answers in this case were good, and that the suit was erroneously brought upon the deed. The decision below was undoubtedly right on the merits of the case, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

W. R. Harrison, J. W. Gordon, and A. H. Conner, for the appellant.

D. M' Donald and A. G. Porter. for the appellee.

(1) *Ante*, 124.

WASHINGTON TOWNSHIP v. BUTLER.

Monday,
December 12.

APPEAL from the *Allen* Court of Common Pleas.

Per Curiam.—Application to township trustees for a township road.

Viewers appointed, who reported that the road would be of public utility. *Butler*, through whose land the line of the road ran, remonstrated, and assessors of damages were appointed, who reported an amount in his favor. The trustees ordered the road established, and the damages to be paid out of the township treasury.

Appeal by *Butler* to the county commissioners. Appeal dismissed because the bond therefor was made payable to the township. Appeal from the commissioners to the

Common Pleas. Jury trial in the Common Pleas, according to the practice prescribed in *Kemp v. Smith*, 7 Ind. R. 471. Nov. Term,
1859.

An increased amount of damages was allowed *Butler*, which, with the costs, were ordered to be paid out of the township treasury. STOWMAN
v.
BLACKBURN.

The suit was carried on in the names of the petitioners and remonstrant.

We see no error in the case.

The judgment is affirmed with costs.

L. M. Ninde and *H. W. Puckett*, for the township.

McCAMPBELL v. ARHEART.

APPEAL from the *Fountain* Court of Common Pleas. Monday,
December 12.

Per Curiam.—This case is here upon the weight of evidence alone. We think the evidence tends to sustain the judgment. The claim sued for was to have been credited on a mortgage, and was not.

The judgment is affirmed with 10 per cent. damages and costs.

M. M. Milford, for the appellant.

I. A. Rice, for the appellee.

STOWMAN v. BLACKBURN and Another.

APPEAL from the *Miami* Court of Common Pleas. Monday,
December 12.

Per Curiam.—In this suit the plaintiff alleges that he has two mills on *Eel* river, on one side thereof, and that the defendants have one mill on the opposite side of said river. He further alleges that he is first to be supplied

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v.
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with water from the river, and that the defendants are only entitled to the surplus. He sues for an alleged taking of more than the surplus.

Issues were formed and tried, and the jury found specially that there was water enough in the river to run all three of the mills all the time; that the defendants did not take for their mill, more than the real surplus water; but that the plaintiff, by neglecting to keep his dam, or his half of the dam, in repair, permitted the water to go to waste. The jury found, also, a general verdict for the defendants.

Points are made here upon rulings of the Court on demurrers; but they are unimportant. The case has been fairly tried upon its merits, and the judgment must be affirmed.

The judgment is affirmed with costs.

N. O. Ross and *R. P. Effinger*, for the appellant.

O. Blake and *J. M. Brown*, for the appellees.

BEVINS and Another v. PRATHER, Administrator.

Monday,
December 12.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—Suit upon a promissory note, of which a copy follows:

“\$800. On the 25th day of *December*, 1855, we promise to pay *Eliza J. Cline* 800 dollars, waiving relief laws of *Indiana*, for value received.

C. Bevins,

“*June 29*, 1854.

L. H. Shumway.”

The defendants answered, setting up a failure of consideration, in this, that *John Cline*, and said *Eliza J. Cline*, his wife, were the equal owners, as joint [tenants], of a tract of land; that they united in the sale of it to *Charles Bevins*, one of the makers of the note sued on (*Shumway* being his surety), and made a joint deed for the same; that, for the consideration, *Bevins* gave 800 dollars cash in hand, and

the note above sued on, which, for certain personal reasons, the answer alleges, was made payable to *Eliza J.*, the wife of *John*, though it avers the same to be the joint property of the two; that, at the same time, and as a part of the contract, said *John* and *Eliza J. Cline* executed to him, said *Bevins*, their joint bond of indemnity against the failure of the title to any of the land deeded; that subsequently *John Cline's* interest in the land was sold on execution against him, and the defendant's, *Bevins'*, title thereby divested.

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1859.

SNODGRASS
v.
SMITH.

A demurrer to the answer was sustained.

Final judgment for the plaintiff for the amount of the note.

We think the answer showed a failure of consideration, at least, to a part, if not all of the note.

If the facts should turn out differently on the trial; if they were not joint tenants, but tenants in common, and the consideration was, at the sale, divided between the grantors with the knowledge of all parties, then the decision upon this answer might not be decisive of the case. See *Williams on Real Prop.*, side p. 109, *et seq.*; 4 Kent, 359.

The judgment is reversed with costs. Cause remanded, &c.

M. M. Ray and *T. J. McFarland*, for the appellants.

W. Herod and *S. Stansifer*, for the appellee.

SNODGRASS v. SMITH.

APPEAL from the *Union Circuit Court*.

Monday,
December 12.

Per Curiam.—This case falls, perhaps, within those of *Lindley v. Dakin*, at this term (1), and *Allen v. Lee*, 1 Ind. R. 58, as modified and explained by *Medler v. Hiatt*, 8 *id.* 171. But if not, an award barred.

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DESHER
v.
PARKS.

The submission to arbitration of the question of damages for an admitted incumbrance upon property sold as free of incumbrance, is not within the prohibition of § 2, 2 R. S. p. 228.

A prior suit pending for a set-off, would prevent its being pleaded to a subsequent. *Rankin v. Halpin*, 4 Ind. R. 585.

The judgment is affirmed with 1 per cent. damages and costs.

J. S. Reid and *J. F. Gardner*, for the appellant.

J. Yaryan, for the appellee.

(1) *Ante*, 388.

DESHER v. PARKS.

Monday,
December 12.

APPEAL from the *Miami* Court of Common Pleas.

HANNA, J.—Suit before a justice of the peace. Judgment for plaintiff, *Parks*, for 50 dollars. Appeal by defendant, and judgment against him in the Common Pleas for 70 dollars, from which he appeals to this Court.

Two trials were had in the Common Pleas, in which the jury failed to agree, after which the Court permitted the plaintiff to file a complaint to which an affidavit was attached, by the attorney of the plaintiff, stating that it was "in substance the same as that filed before the justice," &c.

The record does not contain the original complaint, nor show any reason for filing the new one.

A motion was made by the defendant, and overruled, to reject the new complaint.

As our new code of procedure appears to have been framed upon the notion that it was proper to dispense with mere form as much as possible, and as the affidavit

avers that the complaint filed is substantially the same as the original one, we think it a sufficient compliance with the statute (2 R. S. p. 46), which provides that "if an original paper or pleading be lost, or withheld by any person, the Court may authorize a copy thereof to be filed, and used instead of the original." This Court, in the absence of a reason for permitting the filing, will presume in favor of the order of the Court.

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DESHNER
V.
PARKS.

A demurrer was then filed to the said complaint and overruled, which presents the next point for consideration. The averments are that plaintiff purchased of defendant on, &c., four head of fat cattle, at, &c., and advanced, as part payment thereon, 50 dollars; that said cattle were to be delivered to the plaintiff at *Peru*, on, &c.; that defendant did not deliver them at, &c., but had failed and refused so to do; nor had he paid, or offered to pay, said 50 dollars, &c.

There is no averment that the plaintiff was ready, at the time and place, to receive and pay for the said cattle; and, for that reason, it is insisted that the complaint is insufficient.

The demurrer was properly overruled. The complaint was sufficient, before a justice, to recover the sum advanced and its interest.

The remaining point is that the judgment is excessive. The amount is greater than the sum advanced and interest. We do not think that proof could be properly admitted, under the complaint, of damages for the non-delivery of the cattle; and, therefore, the judgment is too large.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

N. O. Ross and *R. P. Effinger*, for the appellant.

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CHAPMAN and Another v. CHAPMAN.

CHAPMAN
v.
CHAPMAN.

A conveyance by husband and wife, the wife being under age, cannot be avoided by her, even as to herself, simply on the ground of infancy, until her arrival at majority.

At that time, it seems, she might, by some legal mode, avoid the conveyance as to herself, to prevent the possible accruing of an estoppel.

But such avoidance would not, of course, enable her to obtain possession of the property until after the decease of her husband.

She might, probably, avoid the conveyance as to herself, for fraud, before arriving at majority.

She could not have an action for alimony simply, at common law; and the common law has been followed on this point in *Indiana*.

But the statute of 1857 gives such an action; and after the Court in such action has given judgment for alimony, it may set aside a fraudulent conveyance standing in the way of its collection, as in other cases.

A conveyance will not be disturbed for the collection of a merely nominal judgment for alimony, at least till after a refusal or failure to pay that nominal judgment without such disturbance.

Perhaps the officers of Court might, through the judgment, reach the land for the collection of their costs, as in other cases of land fraudulently conveyed.

In a proceeding of this kind, the Court may ascertain the cause and the circumstances of the abandonment. If it occurred under circumstances mitigating or justifying it, it would seem that an equitable case is not made out for giving more than what necessity requires for a support, in connection with the wife's own earnings, where the property of the husband amounted to but 700 dollars.

Monday,
December 12.

APPEAL from the *Lagrange* Circuit Court.

PERKINS, J.—This is a suit by *Lucinda Chapman* against *Daniel Chapman*, her husband, and *David Chapman*, his brother.

Said *Lucinda* is an infant, about seventeen years of age, and has been married about two years. Her husband, she alleges, has treated her badly, and, finally, left her, after having sold his land, being, it appears, about all the property he possessed, she joining in the deed of conveyance with him. The land was sold to *David Chapman*, for 700 dollars, on seven years' credit.

Lucinda asks that that conveyance be set aside, and that she be allowed a support out of the land.

Answer and replication, whereby the cause was put at issue. Nov. Term,
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Trial by the Court; finding that the sale of the land be set aside, and that *Lucinda* be allowed 500 dollars. *Lucinda* thereupon remitted 499 dollars of the amount, and the Court rendered judgment in her favor, that the conveyance of the land be set aside, and for one dollar and costs, and that the particular land in question be sold to make the money.

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v.
CHAPMAN.

The act of the plaintiff below rendered this case so trivial in its termination, that it scarcely merits a discussion. But it involves questions that must, sooner or later, be decided by this Court, and we proceed to briefly consider them.

The conveyance in question could not have been avoided by the plaintiff, even as to herself, simply on the ground of infancy, till her arrival at majority. *Hartman v. Kendall*, 4 Ind. R. 403.—*Pitcher v. Laycock*, 7 *id.* 398. At that time, it would seem, even though her husband were still living, that she might, by some legal mode, avoid the conveyance as to herself, to prevent the possible accruing of an estoppel. See *Hartman v. Kendall*, *supra*. But such avoidance of the conveyance would not, of course, enable her to obtain possession of any part of the property till after the decease of her husband. She might probably avoid it, as to herself, for fraud, before arriving at majority. The plaintiff could not have or maintain this action, at common law, for alimony simply. 2 Bright's Husb. and Wife, p. 357.—Bish. on Marr. and Div., § 549, *et seq.* And the common law has been followed, on this point, in *Indiana*. It was settled, in *Fischli v. Fischli*, 1 Blackf. 360, that an original suit for alimony could not be maintained. That alimony could only be granted as an incident in a suit for divorce, &c. Ind. Dig. 107. In some of the states, the common law on this point has not been followed. Bish., *supra*.

The plaintiff must depend, then, upon statutory provisions, and, so far as this case is concerned, upon those contained in the act of 1857. Laws of 1857, p. 94. By

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v.
CHAPMAN.

those provisions, a wife, in case of abandonment by her husband, may sue for a support in the nature of alimony. If she make out an equitable case, the Court may adjudge her alimony, and may, if necessary, order a sale of property to make the amount allowed. And, we presume, after the Court had given judgment for alimony, it would be in the power of the Court to set aside fraudulent conveyances that might stand in the way of its collection, as in other cases.

At common law, if the husband left the wife in destitute circumstances, she might provide herself, upon his credit, with necessaries, and such his creditors could have caused fraudulent conveyances to be set aside. The statute extends the right of a creditor in this respect to the wife.

In proceeding under this statute, we do not say that the plaintiff may not, in the same suit, ask alimony, and the setting aside of a fraudulent conveyance; but the order of judicial investigation, nevertheless, should be to first try the question of the right to the alimony sought, as, upon its determination would depend the necessity of examining into the validity, except as to the wife, of the conveyance charged to be fraudulent. If no equitable case was made, nor judgment given, for alimony, there would be no judgment to collect out of any property, and, hence, no ground to disturb the conveyance, as to the husband, of any property.

In this case, there is but a nominal judgment for alimony, and the conveyance of property will not be disturbed for the collection of such a judgment, at least, till after a refusal or failure to pay that nominal judgment without such disturbance. Perhaps the officers of Court might, through the judgment, reach the land for the collection of their costs, as in other cases of land fraudulently conveyed.

The judgment in this case, therefore, must be reversed, so far as it unconditionally avoids the conveyance of the land by the husband. And as the judgment will then, perhaps, scarcely embrace the merits of the case, it will be

reversed generally, except as to avoiding the conveyance of the wife, and the cause remanded for another trial, which may be understandingly conducted.

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So far as it avoids the execution of the deed by the wife, it is affirmed.

It may be here observed, that in determining the question of alimony upon a divorce, the Court may, touching the amount, hear evidence as to the cause of abandonment on the part of the husband. So in this case, the Court may ascertain the cause and circumstances of the abandonment. If it occurred under circumstances which mitigated, if they did not justify it; as, if from the malignity of disposition, or the irritating, vexatious conduct, long continued, of the wife, the husband, to secure his own peace, was compelled to abandon her, there would not seem to be a very equitable case made out for giving, at least, beyond what necessity required for a support in connection with her own earnings, in a case where the entire property of the husband amounts to but 700 dollars.

These are questions to be determined by the evidence.

Per Curiam.—The judgment, except as above stated, is reversed with costs. Cause remanded, &c.

J. B. Howe and *J. M. Flagg*, for the appellants.

A. Ellison, for the appellee.

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APPEAL from the *Wells* Court of Common Pleas.

Monday,
December 12.

HANNA, J.—Suit upon the record of a judgment of the Common Pleas Court of the county of *Huntingdon*, state of *Pennsylvania*.

Answer, general denial.

The errors assigned and points made in the brief of counsel are, first, that a transcript of the proceedings, &c.,

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v.
GARNER.

in the case in *Pennsylvania*, was improperly admitted in evidence; and, second, that the judgment is too large.

As to the first objection, as pointed out, to-wit, that the authentication is not sufficient, we are of opinion it is in accordance with § 286, 2 R. S. p. 93.

As to the second objection, the original suit was an action of replevin, in which the property was delivered to the plaintiff, in that action, and he had judgment upon the verdict of a jury for 3 dollars and 33 cents in damages. There is no statute of *Pennsylvania* pleaded by either party. We are not judicially informed, therefore, whether, by the law of that state, it was necessary for the jury to find, and the judgment to show, in whom the title to the property was; nor are we informed as to whether the costs followed the judgment for damages or not. The judgment itself does not show anything upon the subject. Indeed, if entered in this state, it would be informal, as it is merely a memorandum stating that there is judgment on the verdict.

The judgment below is for 170 dollars, and is not for too much if the plaintiff was entitled to recover for the costs in the replevin suit, as contained in the transcript. In the transcript is a receipt, in the following form, at the foot of the column, where the costs are summed up: "Received from ex. of plaintiff.—*J. Steel*." Other parts of the record show *J. Steel* to have been the prothonotary of the Court. No other evidence was adduced but the transcript. Was it sufficient to entitle the plaintiff to a judgment; and if so, to what amount?

As no statute of *Pennsylvania* is shown, we will presume, in accordance with the usual practice, that the right of the plaintiff to a judgment for costs, followed his recovery in the suit against the defendant, as an incident thereto; it is, therefore, not necessary to decide whether the receipt was properly admitted as evidence.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. P. Green, for the appellant.

BROWN and Others v. FLETCHER and Others.

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v.
BRATTAIN.APPEAL from the *Marion* Circuit Court.

Per Curiam.—Demurrer to the complaint sustained, and judgment for the defendants. No exception was taken to the ruling below, therefore no question is presented for our decision.

The judgment is affirmed with costs.

D. Wallace and *J. Coburn*, for the appellants.*S. Yandes* and *C. C. Hines*, for the appellees.Monday,
December 12.

WILEY v. BRATTAIN.

APPEAL from the *Hendricks* Court of Common Pleas. Monday,
December 12.

WORDEN, J.—Suit by *Brattain* against *Wiley* to recover the value of three hundred bushels of apples. Trial by the Court; finding and judgment for the plaintiff.

The appellant makes two points in the case—

1. That there was a trial without an issue upon several paragraphs of his answer.

2. That judgment for costs should have been rendered in his favor.

As we understand the record, there was a replication in denial filed to all the affirmative paragraphs of the defendant's answer; hence, there is nothing in the first point.

It appears by a bill of exceptions that the plaintiff proved his claim as stated in the complaint, to the amount of only 31 dollars, 25 cents, which was reduced by an offset of two dollars; thus reducing the plaintiff's claim to 29 dollars, 25 cents, for which he had judgment.

The second paragraph of the complaint (the first being non-prossed), is as follows, viz.:

“And plaintiff further complains and says that said defendant is indebted to him, the said plaintiff, in the sum

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of 75 dollars, for three hundred bushels of apples (the property of said plaintiff) of the value of 75 dollars, or 25 cents per bushel, which were, on or about the 25th day of *October*, 1857, taken and carried away from plaintiff's orchard, in said county of *Hendricks*, by said defendant, without the license of him, the said plaintiff; wherefore, he demands judgment for 100 dollars."

This paragraph, we think, sounds in tort, and not in contract. It is, in substance, a count in trespass *de bonis asportatis*. Although all distinction between forms of actions is abolished, yet, for the purpose of determining the question involved as to costs, it is necessary to ascertain whether the action is in substance based upon a contract or upon a tort. By § 397 of the code, it is provided that "in actions for money demands on contract," in certain cases, the plaintiff, unless he recover 50 dollars, shall pay costs. This action, however, being based upon tort, and not upon contract, is not within the provisions of the section cited, and the plaintiff was entitled to costs.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

C. C. Nave and *J. Witherow*, for the appellant.

GRIFFIN v. MALONY and Others.

The right of property taken upon execution, may be tried before a justice of the peace, without reference to the value of the property as limiting the jurisdiction.

The general statute defining and limiting the jurisdiction of justices does not apply to this special proceeding.

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December 12.

APPEAL from the *Miami* Circuit Court.

WORDEN, J.—This was a proceeding instituted by the appellant against the appellees, before a justice of the peace, to try the right to certain property, claimed by the plaintiff, and levied upon by the defendants on several exe-

cutions, against one *Ferdinand Griffin*, issued by a justice of the peace.

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The proceeding seems to have been instituted in accordance with the provisions of ch. 5, 2 R. S. p. 493. The value of the property in controversy exceeded 100 dollars; and on appeal from the justice to the Circuit Court, the cause was dismissed on motion of defendants, because the amount exceeded the jurisdiction of the justice. To this ruling the appellant excepted, and the point thus raised presents the only question before us.

The statutory provisions (so far as the point involved is concerned) are substantially the same in the revisions of 1838, 1843, and the code of 1852. Thus, in each of those statutes, provision is made for the trial of the right of property taken on execution; and they are all silent as to the amount over which justices are to have jurisdiction. R. S. 1838, p. 490.—R. S. 1843, p. 783.—2 R. S. p. 493. So, also, in each of those revisions the general jurisdiction of justices is limited to 100 dollars. R. S. 1838, p. 364, § 18.—R. S. 1843, p. 862.—2 R. S. p. 451, § 10.

In the case of *Hanna v. Steinberger*, 6 Blackf. 520, the same question was made and decided. There the value of the goods claimed was 1,350 dollars, and objection was made to the jurisdiction of the justice. The Court say: "The first objection is unfounded. The statute is general, 'that whenever one or more executions shall be levied on any personal property of any person,' &c., 'he may file with any justice,' &c., 'a claim in writing,' &c., and there is no intimation that the trial cannot take place if the value of the goods exceed 100 dollars."

We believe it has been the practice, since the decision in 6 Blackf., to try the right of property taken in execution, before justices of the peace, without reference to the value of the property as limiting the justice's jurisdiction. Such was taken for granted to be the case in *Matlock v. Strange*, 8 Ind. R. 57.

We are of opinion, both on principle and the authority of the above cases, that the general statute defining and limiting the jurisdiction of justices, is not applicable to

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this special proceeding in which the justice is vested with jurisdiction without limitation as to amount. We are strengthened in this conclusion by the fact that the proceeding is not applicable to a case where the property is levied upon by virtue of an execution issued from any other Court than a justice of the peace. In such case, the party claiming the property must seek a different remedy. *Vide Matlock v. Strange, supra.* It seems to have been the intention of the legislature to give parties this remedy before a justice, in all cases where property, without reference to its value, has been levied upon by virtue of an execution issued by a justice. It follows that the ruling below was wrong, and the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

N. O. Ross, R. P. Effinger, and H. P. Biddle, for the appellant.

EAKRIGHT v. THE LOGANS-PORT AND NORTHERN INDIANA RAILROAD COMPANY.

Where, in the organization of a railroad company, all the requirements of the charter were observed, though not in the order prescribed, the organization was deemed sufficient.

Where the charter required that the directors should be named in the articles of association, it was *held* a compliance with the requirement to adopt the articles at the time of electing the directors. But, *held*, also, that the requirement was only directory.

The fact of an illegal election of directors, cannot be set up in resistance of payment of stock.

The articles of association (see opinion) sufficiently show the name of the place from which the proposed road was to be constructed.

Smith v. The Indiana, &c., Railroad Co., 12 Ind. R. 61, followed.

The defendant, in a suit upon a subscription to the original stock of a railroad company, cannot demand inspection of the articles of association subscribed by him and sued upon, on file in the office of the secretary of state.

Nor can he show by parol that he would not have subscribed, if he had supposed a particular route would be adopted.

Representations of officers with whom the power of locating the route is not lodged, will not bind the company as to the location; and even the representations of those who have that power, are matters of opinion, upon which the subscriber has no right to rely, where, by the legal effect of the subscription, the entire consideration of his promise was the shares subscribed for.

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APPEAL from the *Miami* Circuit Court.

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DAVISON, J.—The appellees, who were the plaintiffs, sued *Eakright* upon a subscription of stock to the original articles of association of said company. These articles are set out in the complaint, and read thus:

“We, the undersigned, whose names and places of residence are designated in the margin, for the purpose of organizing a company to construct, own, and maintain a railroad hereinafter mentioned, in pursuance of an act entitled ‘an act to provide for the incorporation of railroad companies,’ approved *May* 11, 1852, do hereby, each for himself, subscribe the number of shares in the capital stock of said contemplated railroad company set opposite our respective names, such subscription payable to said company as the board of directors, when elected, &c., may, from time to time, direct. And we hereby subscribe and agree to the following articles of association, viz.: Article 1. The name and style of the corporation shall be, ‘*The Logansport and Northern Indiana Railroad Company.*’ 2. The capital stock of the company shall be 800,000 dollars, to consist of 16,000 shares of 50 dollars each. 3. The railroad shall commence at the west, or such point on the west line of *De Kalb* county, with a view of connecting with the present *Auburn and Eel River Valley Railroad*, at such point as may be agreed on by the companies so connecting; thence running down *Eel* river valley to *Logansport*, passing through the counties of *Noble*, *Allen*, *Whitley*, *Kosciusko*, *Wabash*, *Miami*, and *Cass*. 4. The number of directors shall be seven. 5. The length of the road will be, probably, seventy-five miles. In witness whereof, we have hereto severally set our names, as parties to the above articles, and subscribed to the capital stock of said company. *December* 1, 1852.

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	<i>William Eakright.</i>	<i>Miami county.</i>	4.	\$200."

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It is averred that on the 10th of *February*, 1853, the organization of the company was completed and perfected by the election of the following board of directors, viz.: *Cyrus Tabor, Stewart B. Kendrick, William Beach, John H. Constant, John Comstock, William Thorn, and William Swazzee*; and that at the time of such election, the subscriptions to the capital stock amounted to more than 1,000 dollars for each and every mile thereof; and that the foregoing articles of association were then adopted by the subscribers thereto, and duly filed in the office of the secretary of state. It is further averred that defendant, by subscribing, &c., made himself liable to pay, &c., at such times and in such manner as the board of directors when elected, &c., might, from time to time, direct; and that the said board, at a regular meeting, held *August 3*, 1853, ordered that an installment of 10 per cent. on the capital stock of the company be called for and made payable in ten days from that date, and further installments of 10 per cent. be called for and made payable, each and every month thereafter, until the full amount shall be paid, &c. It is also averred that due notice was given, &c., but the defendant refused to pay, &c.

Defendant demurred to the complaint; but his demurrer was overruled.

The statute under which this railroad company was organized, contains these provisions:

1. "Whenever stock to at least 50,000 dollars, or 1,000 dollars for each and every mile of the proposed road shall have been subscribed, the subscribers to such stock shall elect directors for such company from their own number, and shall severally subscribe articles of association, which shall set forth the name of the corporation, the amount of the capital stock of the company, * * * the number of shares of which said stock shall consist; the number of directors, and their names, to manage the affairs of the company; the name of the place from which, and the place to which, the proposed road is to be constructed, and each

county into which or through which it is intended to pass, and its length, as near as may be. Such subscriber to such articles of association shall state his place of residence, and the number of shares taken by him in such company."

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2. "That the articles of association thus formed shall be filed in the office of the secretary of state," &c. 1 R. S. pp. 409, 410.

The complaint, it is insisted, is defective on four grounds, to-wit—

1. It does not show a subscription of stock, and an election of directors, preliminary to the construction of the articles of association.

2. The articles themselves do not set forth the names of the directors.

3. Nor do they show distinctly the name of the place from which the proposed road is to be constructed.

4. It is not shown when, where, and how the demand for the payment of the installments, assessed by the directors, was made.

As we have seen, the statute says that, whenever stock to at least 50,000 dollars, &c., shall have been subscribed, the subscribers shall elect directors, &c., and shall severally subscribe articles of association, &c., which articles shall set forth the number of directors, and their names, &c. This seems to contemplate certain steps to be taken by the subscribers, before they construct the articles of association; but it seems to us that a substantial compliance with the statute is sufficient. If, in the proceeding to organize such company, from its commencement to its completion, all the requirements of the statute have been observed, though not in the order which it prescribes, such organization may, in our opinion, be deemed sufficient. *The Covington, &c., Plankroad Co. v. Moore*, 3 Ind. R. 510. Here the directors are not named in the articles of association; but it appears that they were elected at a meeting of the subscribers, after the stock was subscribed, and the articles were constructed; and further, at the same meeting at which they were elected, the same articles of association

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were expressly adopted by the subscribers. Indeed, all the requirements of the statute have, in this instance, been literally pursued, save that of naming the directors in the articles of association, and that, it seems to us, has, in effect, been done by the adoption of the articles when the directors were elected. At all events, the requirement that they be named in the articles, may be held merely directory, and not, in view of the facts stated in the complaint, essential to the validity of the corporation. Moreover, there is an authority which, in effect, decides that the fact of an illegal election of directors cannot be set up in resistance of the payment of stock, but would be a case for a *quo warranto*, to oust the illegally elected directors. *The Newcastle, &c., Turnpike Co. v. Bell*, 8 Blackf. 584. See, also, *The Covington, &c., Plankroad Co. v. Moore*, *supra*; *The Western Plankroad Co. v. Stockton*, 7 Ind. R. 500.

The third ground of objection to the complaint, viz., that the articles of association do not show, distinctly, the name of the place from which the proposed road is to be constructed, is untenable; because the statute simply requires the name of such place to be set forth. This must be done with a reasonable degree of certainty. In our opinion, the articles on their face, show that this requirement of the statute has been properly complied with. And in reference to the fourth objection to the complaint, we will simply refer to *Smith v. The Indiana, &c., Railway Co.*, 12 Ind. R. 61, where it was held that, in a suit upon a subscription of stock to recover installments regularly assessed in accordance with the terms of the subscription, the subscriber is not entitled to notice of the assessment, or the time and place of payment, before suit; that the contract to pay by installments is, in such case, a promise to pay on demand, and the demand involved in the commencement of the suit, is alone sufficient. See, also, 6 Ind. R. 297.—10 *id.* 499.

Defendant's answer to the complaint contains five paragraphs. To the first, there was a demurrer sustained, but no exception was taken; hence the action of the Court in

sustaining the demurrer, is not properly before us. To the other paragraphs, there was a general denial. The second alleges "That at the time the defendant made the subscription, a random line of the contemplated railroad had been run, which passed through a corner of his land, situate on the north side of *Eel* river, which land adjoined the town of *Mount Vernon*, in *Miami* county; that said line ran parallel with said river, and one mile distant therefrom; that defendant resides on said land, and was anxious for the construction of a railroad running on the north side of that river, and through or near his land; that he was induced to sign the subscription by the agents of the contemplated road, who represented to him, and caused him to believe, that said random line, so run, would be the permanent line of the road; or if the same should be changed, that it would, in any and every event, run north of said river, and near to the town of *Mount Vernon*, against which defendant's land abuts. And he avers that the consideration of his subscription was the location of said road north of *Eel* river, agreeably to the agents' representations. And, further, he avers that the company, since their organization, located their road south of *Eel* river, at least two miles from his land, which location defeats the whole object of the defendant in making the subscription." The third, fourth, and fifth paragraphs make no point in the case, and will not, therefore, be further noticed.

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Verdict for the plaintiff, upon which the Court, having refused a new trial, rendered judgment, &c.

The record shows that the defendant, upon the calling of the cause, and before he answered the complaint, demanded an inspection of the writing sued on, alleged to have been subscribed by him; but his demand was refused and he excepted.

We are referred to § 80 of the practice act, which says: "The party shall, in all cases, have inspection of the instrument of writing in suit, before pleading." 2 R. S. p. 44. But this rule can only apply, where the instrument is in possession of the opposite party, or under his control. Here, the articles of association subscribed by the defend-

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ant, and sued on in this case, are on file in the office of the secretary of state, and, consequently, could not be produced by the plaintiffs upon the demand in question.

There is no error in this branch of the case.

At the proper time, the defendant moved thus to instruct the jury: "If the subscription was obtained under the inducements and representations stated in the second paragraph of the answer, and the company have not located their road in conformity with such representations, but, on the contrary, have so located it as wholly to defeat the object of the defendant in subscribing, and in direct opposition to the representations on which the subscription was obtained, the jury should find for the defendant."

This instruction the Court refused, and the defendant excepted.

Upon the inquiry thus presented, a late writer on railroad law says, that "a provision as to the location, so as to be binding on the company, and render the subscription conditional, must be inserted in the agreement;" that "a subscriber cannot defend a suit for calls by parol proof that he should not have become a party to the agreement unless he had supposed a particular route would have been adopted;" and that "the representations of a class of officers with whom the power of location is not lodged, will not bind the company." And "even the representations of those who have such power, are mere matters of opinion on which he has no right to rely." *Pierce on Am. Railr. Law*, 72, 73.

This exposition is supported by authority, and has been followed by this Court. *Clem v. The Newcastle, &c., Railroad Co.*, 9 Ind. R. 488.—*The New Albany, &c., Railroad Co. v. Fields*, 10 *id.* 187.

In the case before us, the subscription being absolute on its face, verbal proof of the facts alleged in the second defense, should not be allowed to bar the action; because, according to the legal effect of the instrument which the defendant subscribed, the entire consideration for his promise was four shares of stock in the company, and consequently, the representations of the agents must be held

mere expressions of opinion, upon which the defendant had no right to rely. *The New Albany, &c., Railroad Co. v. Pickens*, 5 Ind. R. 247.—*Russell v. Branham*, 8 Blackf. 277.—*Starr v. Bennett*, 5 Hill, 303.

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The Court, in its refusal of the instruction, committed no error. And we think the verdict is right on the evidence.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

N. O. Ross and *D. D. Pratt*, for the appellant.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
PACE.

APPEAL from the *Lawrence* Circuit Court.

Tuesday,
December 13.

PERKINS, J.—Suit by *Pace* to recover the value of stock killed on the track of the *New Albany and Salem Railroad*. Judgment for the plaintiff, on appeal to the Circuit Court. Two cows, one of the value of 30 dollars, and one of the value of 20 dollars, were killed. They were killed at a point where the road was fenced, though the fences were not built by the railroad company. They seem to have been killed near where a county road crossed the railroad. The defendants had constructed cattle pits at the crossing, but not sufficient to exclude cattle, owing to a solid rock foundation, and had built side fences to connect the pits with the fences inclosing the railroad. This was all the evidence.

The Court held the railroad company liable, partly, it would seem, because the fences were not built by the railroad company. It certainly cannot be material who builds the fences, so that they are erected. The security to the public afforded by the fences, is the object. The railroad companies must see that the roads are fenced. If the proprietors of adjoining lands do not erect fences, the railroad

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companies must. If they do, it is unnecessary that the railroad companies should also fence. So the railroad companies must see that the fences along the road, no matter by whom built, are kept in repair. If the proprietors do not keep them in repair, the railroads must. The fences must be kept in repair, or the roads will be held liable under the statute. If they are kept in repair, the roads will be held to the common-law liability simply, for negligence.

The statute does not expressly require the construction of cattle pits at road crossings, but perhaps they may be fairly embraced under the general term fence. Without them, stock could not be excluded from the track. See the statute in *The Madison, &c., Railroad Co. v. White-neck*, 8 Ind. R. 217.

We think there may have been, in this particular, such a failure to comply with the statute, as justified the judgment.

Rocks may be removed by drills, gunpowder, and fire.

Per Curiam.—The judgment is affirmed with 5 per cent damages and costs.

W. G. Cooper, for the appellants.

A. B. Carlton and *T. R. Cobb*, for the appellee.

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Tuesday,
December 13.

APPEAL from the *Henry* Court of Common Pleas.

PERKINS, J.—Suit for an assault and battery. Issues of fact. Trial by jury; verdict and judgment for the plaintiff for 500 dollars.

An instruction was asked and refused. The record does not purport to contain all the evidence; hence, we must presume the instruction was refused, because not correct as applicable to the case made by the evidence.

An instruction was given which, it is contended, was

not justified by the evidence. Upon a case that the evidence might have made under the issues, the instruction would have been correct. The evidence not being in the record, we must presume such a case was made.

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In this case, there is a bill of exceptions containing evidence touching a fact, and the bill closes by saying that is all the evidence touching that fact. But no case is stated by the Court upon notice of intention to take the case to the Supreme Court upon a question of law ruled upon the fact; and, hence, the bill of exceptions amounts to nothing in the record. This has been often decided. *Spencer v. Russell*, 9 Ind. R. 157, and cases cited. See *Adams v. Kerns*, 11 *id.* 346.

Had the Court been notified of the object of the bill, it might have contained a fuller statement of facts, and of the grounds of the rulings of the Court thereon.

The record should have contained all the evidence given in the cause, or a case specially stated by the Court pursuant to § 347, 2 R. S. p. 116, in order to have subjected the particular ruling of the Court below to a review in this Court.

There is a similar error in this case, in an instruction as to vindictive damages, to that which occurred in *Taber v. Hutson*, 5 Ind. R. 322, but it is not relied on by counsel, is not even alluded to in the brief, and, hence, will be treated as waived.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

W. Grose, for the appellant.

J. Brown, for the appellee.

ANDEREGG, Executor, v. Ross.

The first item of the disposing part of the will in this case, was a bequest to the wife of the testator, of all his real estate, &c., personal estate, &c., and

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everything he had or owned at the time of his decease, for her life, she paying his debts, and a certain legacy. It was then provided that said legacy should be paid by the wife, not by the executor. Other special legacies are then provided for, to be paid after the death of the wife, out of such part of the personal estate as might be in her hands at the time of her death; and if the personal estate was not sufficient for that purpose, land was to be sold, &c.; but no provision was made for a resort to the executor to obtain funds for that purpose. Certain residuary legacies are then set forth, to be operative after the death of the wife. Then followed a provision that she should use all the personal estate, and the rents and profits of the real estate, "or so much thereof as she may require for her use and benefit;" but this is followed immediately by this language—"and may and shall have the absolute use of all my said real and personal estate, for and during the term of her natural life, and no longer;" and then again the expression occurs, that she "shall use, expend, and consume such parts of my personal estate, and the rents, issues, and profits of my real estate, as she may require for her own use and benefit." Then followed a clause declaring that his business partnerships might be continued for the benefit of his wife as long as his executors should think the interest of his estate might require it.

Held, that the will, as a whole, discloses that the testator intended to give his wife the absolute control of his real and personal property, for her use, during her life.

Tuesday,
December 13.

APPEAL from the *Dearborn* Court of Common Pleas.

HANNA, J.—On the 10th of *November*, 1853, *George Ross* died, testate, leaving a widow, but no children. His widow and *Anderegg*, the plaintiff, were by him named to execute his will. Immediately after his death the will was proved, and letters testamentary issued to the plaintiff and defendant, both of whom qualified, &c., and acted until *September*, 1855, when she was removed from the trust, by order of the Court.

Anderegg, in his complaint, now charges, that notwithstanding her removal, she has possession of the personal property left by the decedent, and has received the rents and profits arising from the real estate, &c., of deceased. He asks that, except such real and personal property as may be necessary to her habitation and convenience, and such sum as may be annually necessary for her support, the property, real and personal, and the profits arising therefrom, may be ordered to be delivered to him, as such executor, for the use and benefit of the estate, and ultimately for the residuary legatees of said decedent. This application the defendant resists, on the ground that, by

the last will and testament of her husband, she is, during her life, entitled to the absolute possession and control of the property, real and personal, of her said husband, and to the rents and profits issuing out of, or arising therefrom.

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The question depends upon the construction which may be given to the will of the deceased, as each party claims through that. The parts of that instrument necessary to the elucidation of this point are as follows:

“*First.* I give and devise to my beloved wife, *Margaretha Ross*, in lieu of her dower (and in place of any and all provisions of law now made, or hereafter to be made, giving to her any interest in my estate), all of my real estate, lands, and tenements for and during her natural life; and I also give and devise to my said wife, *Margaretha*, all of my personal estate, stock, household goods, furniture, choses in action, and everything that I have or own at the time of my decease, during her natural life, as aforesaid; she paying all my just debts and the legacy hereinafter named to *Rosina Ross*. I give and bequeath to *Rosina Ross*, daughter of *John Ross* (now living with me), 1,000 dollars, to be paid to her by my said wife when she, said *Rosina*, shall arrive at the age of twenty-one years: provided, however, that my said wife may pay over to said *Rosina*, said sum, or any part thereof, at any time she may think it best so to do, before she (said *Rosina*) arrives at the age of twenty-one years.

“At the death of my wife, I give and bequeath,” &c. [Here follows three bequests of 500 dollars each, after which this language occurs:] “I direct that the foregoing legacies and bequests be paid out of such parts of my said personal estate, or the proceeds thereof, as may be in the hands of my said wife at the time of her death; and if said personal estate be not sufficient to pay the same, that the same be paid by the sale of a quantity of my real estate sufficient for that purpose. I further give and devise, at the death of my said wife, all of the residue of my said real estate (that is to say, all of my real estate), and all of my said personal estate, and the proceeds thereof,

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which may remain unconsumed and unexpended in my said wife's hands, excepting so much thereof as may be necessary to pay the foregoing legacies or bequests to the children," &c. [Here occurs the residuary bequests, and then follows this language:] "That is to say, at the death of my said wife, I devise and bequeath all of my real and personal estate which may not have been expended or consumed by my said wife, and which may not have been taken or used in payment of said legacies or bequests, to such of the children," &c. [Again the residuary legatees are designated, and the will then proceeds:] "I further will and devise that my wife shall and may use any and all of my personal estate, and the rents and profits of my real estate, or as much thereof as she may require, for her own use and benefit, and may and shall have the absolute use and control of all my said real and personal estate for and during the term of her natural life, and no longer; she (my said wife) having the right to use, expend, and consume such parts and portions of my said personal estate, and the rents, issues, and profits of my real estate, as she may need or require for her own use and benefit. And whereas I am now connected in business with other persons in partnership in a mill and distillery, and a malt-house, in said *Dearborn* county; and which business could not be suddenly closed without disadvantage, I hereby authorize and empower my executors, for and in behalf of my said wife, to continue with my said partners and carry on and transact the same business in connection with my said partners, as long after my decease as they, my said executors, may think the interest of my estate may require," &c.

The proper mode of arriving at the intention of the testator, is to view all the parts of the will in connection. It will not do to select any single paragraph of a will, of the character of the one under consideration, and from that single paragraph undertake to give a construction in conflict with other parts. All parts which have the appearance of conflict, or contradiction, should be reconciled if possible. In other words, we should seek to know the

intention of the testator, and carry that out, if it can be ascertained from the whole instrument.

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In the case at bar, the first item of the disposing part of the will, is a bequest to the wife of the testator, of all his real estate, lands, and tenements, personal estate, stock, household goods, furniture, choses in action, and everything he had or owned at the time of his decease, for and during her natural life; "she paying all my just debts and the legacy hereinafter named, to *Rosina Ross*." It is then provided that said legacy should be paid by the said wife—not by the executors. Other special legacies are then provided for, to be paid after the death of the said defendant "out of such parts of my personal estate, or the proceeds thereof, as may be in the hands of my said wife at the time of her death." It is further provided that if said personal property is not sufficient for that purpose, lands shall be sold, &c.; but no provision is made for a resort to the executors to obtain funds for that purpose, and, therefore, the inference is just, that the testator did not intend that funds to any great amount should pass into the hands of the executors. Certain residuary legacies are then set forth; said bequests to be operative, as before, after the death of the wife; then follow the provisions which, it is insisted, limit the rights of the wife to the use of such property, and the reception of such sums only, as may be necessary to her reasonable and comfortable maintenance, namely, that she should use all the personal estate and the rents and profits of the real estate, "or so much thereof as she may require for her use and benefit;" but this is followed immediately by this language, "and may and shall have the absolute use and control of all my said real and personal estate for and during the term of her natural life, and no longer;" and then again the expression occurs that she "shall use, expend, and consume such parts of my personal estate, and the rents, issues, and profits of my real estate as she may require for her own use and benefit." Then follows a clause declaring that the business partnerships which he then had, might be continued for the bene-

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Now, although there are two or three expressions in the will which would, if taken alone, appear to indicate that it was the intention of the testator that his wife should not receive and control any more of the profits, &c., arising from his said property, than might be necessary to her comfort and support, yet, when viewed altogether, we are clearly of opinion the whole will discloses that the testator intended to clothe his wife with the absolute control of his real and personal property, for her use, during her life—perhaps that control would be confined to that purpose—this we need not decide. The payment of the debts, of the amount of which we are not informed, and the legacy of 1,000 dollars, having been devolved upon the wife, without doubt it was the intention of the testator to place the means within her reach to accomplish that purpose.

Per Curiam.—The judgment is affirmed with costs.

W. S. Holman, T. Gazlay, and J. Schwartz, for the appellant.

13 416
143 356

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A defect in the complaint for want of verification cannot be reached by a demurrer assigning for cause that the complaint does not state facts sufficient, &c., if, indeed, it can be reached at all by demurrer. Such defects do not seem to be embraced in any of the statutory causes for demurrer; and if, in such case, a verification and bond be filed after the trial, the defendant cannot complain.

A motion to set aside the complaint, or stay the proceedings, would perhaps be the correct practice.

A party may prove by parol that in a previous suit he offered and gave in evidence a judgment.

An objection that no default was taken against nominal defendants, and no issue joined, cannot be raised for the first time in the Supreme Court.

A party cannot, after having the full benefit of a judgment as a set-off, complain, on appeal, that in his notice of set-off, the judgment was misdescribed, if no advantage was taken of the misdescription.

The administrator of an estate which has been declared insolvent, is not obliged to set off a judgment in favor of his decedent, against a claim upon his estate; but having done so, he cannot complain because it makes an unequal distribution. Setting off a judgment in such case, is an extinguishment of it.

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MOORE.

APPEAL from the *Hamilton* Court of Common Pleas. *Tuesday, December 13.*

WORDEN, J.—Suit by the appellee against the appellants, the object of which was to enjoin the collection of a certain judgment recovered before a justice of the peace, in *October*, 1848, by *Denny*, as such administrator, against *Joseph Moore*, the plaintiff, and others, for the sum of 94 dollars, 58 cents, and costs. It is averred that after the recovery of the judgment, viz., on the 16th of *November*, 1848, the plaintiff filed his claim, in the proper Probate Court, against the estate of said *Mordecai Moore*, deceased, for work and labor, &c., done by the plaintiff for said *Mordecai* in his lifetime. To this claim said *Denny*, as such administrator, pleaded the general issue, and gave notice that he would set off against such claim, the aforesaid judgment, and on the trial of the cause he offered said judgment in evidence as a set-off, and it was, without objection, allowed to him.

Pleadings were filed by *Denny*, not necessary to be here stated, and the cause was tried by the Court, who found for the plaintiff, overruled a motion for a new trial, and rendered judgment on the finding.

The defendants appeal and assign several errors, which will be noticed in their order.

The first is, that the Court erred in overruling a demurrer to the complaint. The ground taken is, that the complaint was defective in not being verified, and because no bond had been given as required by law. There was no restraining order or preliminary injunction asked for or obtained in the case. The relief sought was a perpetual injunction on the final trial or hearing of the cause, and it is, perhaps, doubtful whether the statute should be so construed as to require the complaint in such case to be verified, or a bond to be filed. But we do not decide this point, as we are of opinion that if such verification and bond

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were necessary, a demurrer assigning for cause that the complaint does not state facts sufficient, &c., will not reach such defects. Perhaps they are not to be reached by a demurrer at all. Such defects do not seem to be embraced in any of the specified causes for which a demurrer may be filed. 2 R. S. p. 38, § 50. A motion to set aside the complaint, or stay the proceedings, would, perhaps, be the correct practice.

The second error assigned is, that parol evidence was improperly admitted. The record shows that on the trial the plaintiff proved, over the objection of defendants, that on the trial of the cause in the Probate Court, before mentioned, *Denny* offered and gave in evidence, as a set-off to the plaintiff's claim therein, the judgment so recovered before the justice. We see no objection to this testimony. It was not proving the record by parol. It was a simple fact that perhaps could not be proven otherwise than by parol. The record, it is said, would prove itself. That may be true, and yet it would not prove the additional and important fact that it had been offered in evidence on the trial of another cause. We do not understand the bill of exceptions as showing that the Court permitted the existence or contents of the judgment to be proven by parol, but the fact that it was offered in evidence on the trial in the Probate Court, and this seems to have been entirely proper.

It is assigned for error, thirdly, that the Court proceeded to trial without first defaulting, or in any manner causing an issue to be joined between the plaintiff and the defendants, *O'Brien* and others. *O'Brien* and the other defendants, except *Denny*, were mere nominal defendants, being the officers connected with the issuing of an execution upon the judgment, and the collection thereof, and no judgment was taken against them, except that they, as well as *Denny*, be restrained from proceeding to collect the judgment. No judgment for costs was rendered against them. But had they been real parties, we think such objection could not be successfully made for the first time in this Court. The attention of the Court below was not called

to the irregularity, and the error, if any was committed, was waived.

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The fourth assignment is, that the Court erred in overruling the motion for a new trial. We are of opinion that on the merits the Court found correctly. It appears that on the trial of the cause in the Probate Court, *Denny* offered the judgment in evidence as an offset to the plaintiff's claim, and that it was received without objection and allowed. There was a variance between the description of the judgment in the notice of set-off, and that described in the complaint, and offered in evidence on the trial in the Probate Court, but no advantage was taken by the plaintiff of this variance, and, as before remarked, the judgment was offered and received without objection, and allowed. *Denny* cannot, after having the full benefit of the judgment allowed him in the way of a set-off, now complain that in his notice of set-off the judgment was misdescribed, of which misdescription no advantage was taken.

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MOORE.

There is another point that may be here noticed. The judgment was rendered upon a note given by the plaintiff for property purchased by him at the administrator's sale of the property of the deceased, and the estate had, before the trial of the cause in the Probate Court, been duly declared insolvent, and an order made to settle it accordingly. It is insisted that the judgment could not, in such case, be legally set off against a claim upon the estate, as thereby an unequal distribution of the effects would take place. The administrator was not bound to set off the judgment against the plaintiff's claim upon the estate, but having done so, he cannot now complain of it. The setting off of the judgment satisfied and extinguished it; and if the plaintiff thereby received more than other creditors, it was no fault of his, nor is the judgment, therefore, any the less fully satisfied and discharged. Instead of setting off the judgment, the administrator might, undoubtedly, have collected it, and paid the plaintiff only his *pro rata* share of his entire claim against the estate; but having thus set it off, he has precluded himself from exercising such right.

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The fifth, sixth, and seventh errors assigned are, that the finding is not sustained by the evidence; that the judgment is contrary to law; and that error of law occurred on the trial, which was excepted to. The points involved in these assignments, have been already noticed.

The only remaining error assigned is, that the Court permitted the plaintiff, after the cause had been tried by the Court, and after the motion for a new trial had been overruled, to append an affidavit to his complaint, and file a bond, as required by law. We are of opinion that the appellants cannot complain of this. We have already seen that the want of an affidavit and bond was not reached by the demurrer, and that no steps were taken to require the complaint to be verified and a bond to be filed. No motion was made to set aside the complaint, or to stay the proceedings, or otherwise take advantage of the want of a verification and bond, and, therefore, the proceeding would not be erroneous without either. Hence, the filing of them, after the trial, did the appellants no harm.

We find no error in the record for which the judgment ought to be reversed.

Per Curiam.—The judgment is affirmed with costs.

W. Garver and *J. Green*, for the appellants.

D. Moss and *E. S. Stone*, for the appellee.



ARMSTRONG and Others v. BERREMAN, Administrator.

A husband made a will by which, after providing for the payment of his debts, &c., he bequeathed to his wife all the rest of his estate, both real and personal, during her life, and "to be disposed of by her at her pleasure." He died, leaving no child, nor father nor mother. The statute regulating descents, &c., provides that "If a husband or wife die *intestate*, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go to the survivor."

Held, that a surviving wife takes the estate, in such case, under the statute,

13	422
126	563
13	422
134	80
13	422
171	339

notwithstanding a will may have been made, so far as it is not otherwise disposed of by that will. Nov. Term,
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Section 41 of the statute regulating descents, can have no bearing upon a case of this kind. ARMSTRONG

An amendment of a statute or section cannot be made without setting out the amended statute or section at full length. V.
BERREMAN.

APPEAL from the *Hendricks* Court of Common Pleas. Tuesday,
December 13.

WORDEN, J.—This was a suit brought by *Armstrong* and others, who claim to be heirs at law of *Benjamin Armstrong*, deceased, against *Berreman*, administrator of *Sarah Armstrong*, deceased, who was the widow of *Benjamin Armstrong*, for the recovery of certain personal property, or the proceeds thereof, which belonged to the estate of said *Benjamin*, deceased, and also for the partition between the plaintiffs of the real estate of said *Benjamin*.

The facts charged are, in substance, that in *March*, 1855, said *Benjamin Armstrong* died, leaving no children, but leaving *Sarah*, his widow, surviving him, and the plaintiffs, who were the brothers and the children of deceased brothers of *Benjamin*; that *Benjamin*, before his death, made his will, by which, after providing for the payment of his debts and funeral expenses, he bequeathed to his wife, "all the rest of his estate, both real and personal, during her life, and to be disposed of by her at her pleasure." He also appointed her his executrix. Letters testamentary were duly issued to her, and she made and filed in the proper Court an inventory of the personal estate, having caused the will to be duly admitted to probate; that the personal estate amounted to 7,540 dollars; that there were no debts to be paid, except one small sum; that afterwards, in 1855, the said *Sarah* died intestate, leaving surviving brothers and half-brothers, &c.; that afterwards, on the 8th of *October*, 1855, the defendant, combining and confederating with others, &c., to cheat and defraud the plaintiffs out of the estate of said *Benjamin*, took out letters of administration upon the estate of said *Sarah*, with the fraudulent design and intention of appropriating to his own use the goods and effects belonging to the estate of said *Benjamin* (which the plaintiffs

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1859.

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v.
BERREMAN.

claim belonged to them after the death of said *Sarah*), and caused the same to be inventoried and appraised as the property of said *Sarah*; that he afterwards caused the property to be sold. The complaint also charges that *Benjamin* left certain real estate, which is described, and that the defendant has received the rents and profits thereof since the death of said *Sarah*, and prays an account of such rents and profits, and that partition be made between the plaintiffs of the real estate; also, that the proceeds of the personal estate be distributed, &c.

Answers were filed, and replications; and exceptions were taken to several rulings of the Court on demurrers.

Trial by the Court. The Court found for the defendant, and rendered judgment, overruling a motion for a new trial.

From the view which we take of the case, it will be unnecessary to examine any other question attempted to be raised, than the one which meets us at the threshold. Is there a cause of action stated in the complaint? In other words, are the plaintiffs, according to their own showing, in any manner interested in the estate of *Benjamin Armstrong*, and are they entitled to any portion thereof?

Passing over the question whether the terms of the will give the widow anything more than a life estate in the real and personal property of *Benjamin*, we shall inquire what were her rights, upon the facts stated, under the law. Section 26 of the "act regulating descents and the apportionment of estates" (1 R. S. p. 251), provides that "If a husband or wife die, intestate, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go to the survivor." What is the proper construction of this section? Are its provisions not to apply in any case where a will has been made by the deceased? or, was it the intention of the legislature that the estate should go as therein provided in all cases where there was no will making a different disposition of the property? We think the latter was evidently the case. Suppose a man die, leaving no child, nor father or mother, but having made a will bequeathing a small portion of his

estate to a friend, there being a large residuum undisposed of. Shall the surviving wife not take it under the provisions of the section quoted, because of the bequest? As before remarked, we think that, in such case, the surviving wife should be held entitled to the property, so far as it was not otherwise disposed of by a will. This is evidently in accordance with the spirit of the statute and the intention of the legislature, as gathered from the whole act. Take the first section: "The real and personal property of any person dying intestate, shall descend to his or her children in equal proportions," &c. But suppose the person die testate, having made a will disposing of a small part of his property to some one else, leaving a large balance undisposed of, shall not the balance descend to his children in the manner provided by this section? Again, take the eleventh section, which provides that the estate of any person dying intestate, without kindred capable of inheriting, shall escheat to the state for the benefit of common schools. But suppose a will be made in such case, disposing of a part only of the estate, where shall the remaining portion go? Will the state not be entitled to it for the support of schools, under this section, although the deceased did not literally die "intestate?" Indeed, the whole statute on the subject of descents provides only for the disposition of the estates of persons dying "intestate," and unless its provisions are followed where a will is made, so far as the property is undisposed of by the will, the portion not thus disposed of by will, can go to no heir by virtue of any statutory provision, nor can it escheat to the state, but would be liable to be seized upon by any person, who might see proper to intrude upon and occupy it. We are of opinion that the simple fact that *Benjamin Armstrong* made a will, is no reason why the provision first above quoted, should not apply in favor of his surviving widow. So far as the property was undisposed of by will, the deceased may be said to have died intestate.

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BERREMAN.

Section 41 of the act may be thought to have some bearing on this question. It provides that "If lands be devised to a woman, or a pecuniary or other provision be

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BERREMAN.

made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will retain the right to one-third of the land of her late husband; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed, in addition to her right in the lands of her husband."

Dower having been abolished, and one-third of the land in fee substituted, which the widow takes as against heirs and creditors, the above section was intended merely to prevent her taking one-third thus provided for, and also a provision made in the will and intended to be in lieu thereof. She shall elect whether she will take the provision so made, or retain the right to one-third of the land of her late husband, but she shall not be entitled to both, &c. Both what? Both the provision thus made, and one-third of the land. It is clear that this section has no application to a case where a surviving wife claims the whole estate as an heir, as in the case provided by § 26, where there are no others capable of inheriting before her.

The appellants, however, rely upon § 4 of the act of 1853 (Acts of 1853, p. 56), by which § 26, above quoted, was attempted to be amended so as to provide that "if a husband or wife die intestate, leaving no child, and no father or mother, nor brothers and sisters, nor their descendants, the whole of his or her property, real or personal, shall go to the survivor."

It is claimed that this amendatory statute is constitutional and valid.

It has been so often settled by the adjudications of this Court, that an amendment of a statute or section cannot be made without setting out the amended statute or section at full length (which was not done in this case), that the question should be considered thoroughly and finally settled. *Vide Langdon v. Applegate*, 5 Ind. R. 327; *Kennon v. Shull*, 9 *id.* 154, and cases there cited.

The law gave to the surviving widow of *Benjamin Armstrong*, in the absence of children, and father and mother, his property, real and personal. The will, as set up, gave none of it to the plaintiffs, nor did it deprive the widow of any rights to which she was entitled under the law, as it bequeathed the property to no one else. The defendant, *Berreman*, was entitled to take possession of it, at least the personal property, as her administrator, and her heirs were entitled to the real estate. The plaintiffs, by their own showing, have no interest in either, and, consequently, the case was properly decided against them.

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave and *J. Witherow*, for the appellants.

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1859.

BOWLES
V.
THE STATE.

BOWLES v. THE STATE.

Information charging that the defendant, on, &c., at, &c., did “unlawfully bring into the state of *Indiana*, and into *Orange* county, a negro woman, whose name is *Polin*, and then and there encouraged said negro woman to remain and continue here,” &c.

Held, 1. That the bringing into the state was no penal offense.

2. That the charge of encouragement, though it substantially follows the language of the statute, is too vague. The particular acts of encouragement should be stated.

18	427
153	4
18	427
150	415

APPEAL from the *Orange* Court of Common Pleas.

Tuesday,
December 13.

WORDEN, J.—Information against the defendant, charging that on, &c., at, &c., he did “unlawfully bring into the state of *Indiana*, and into *Orange* county, a negro woman, whose name is *Polin*, and then and there encouraged said negro woman to remain and continue here in *Orange* county, in the state of *Indiana*; contrary,” &c.

A motion to quash the information was made and overruled, to which ruling exception was taken.

Plea, trial, and conviction; motion for a new trial overruled, and judgment.

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BOWLES
v.
THE STATE.

The information is predicated upon § 7, ch. 74, 1 R. S. p. 375, which is as follows, viz.:

“Any person who shall employ a negro or mulatto who shall have come into the state of *Indiana* subsequent to the thirty-first day of *October*, in the year one thousand eight hundred and fifty-one, or shall hereafter come into the said state, or who shall encourage such negro or mulatto to remain in the state, shall be fined,” &c.

It is insisted that the penal part of the above statute is unconstitutional and void, inasmuch as there is, as is claimed, an incongruous blending of civil rights and duties, and criminal liabilities, in the same statute, contrary to the fundamental provision that “every act shall embrace but one subject, and matters properly connected therewith.” *The Indiana Central Railway Co. v. Potts*, 7 Ind. R. 681, is relied upon to sustain this position. We deem it unnecessary to express any opinion on this point, as the information is defective on other grounds. It may be remarked, however, that no constitutional questions of this character were raised or considered by the Court in the case of *Barkshire v. The State*, 7 Ind. R. 389.

It will be observed that neither the statute above cited, nor the thirteenth article of the constitution, makes it a penal offense for a person to bring a negro or mulatto into the state. A penalty is inflicted upon a negro or mulatto coming into the state contrary to the provisions of the act, and also upon a person employing such negro or mulatto, or encouraging such negro or mulatto to remain in the state.

All that is charged in the information as to the appellant’s bringing the negro woman into the state, must be disregarded, as that constitutes no penal offense.

The information does not charge that the defendant employed the woman. It simply charges that he encouraged her to remain and continue in the state. This is charged substantially in the language of the statute; but that, in our opinion, is not sufficient. There might be a multiplicity of ways to encourage the woman to remain, and the specific acts of encouragement ought to be set forth, in or-

der that the defendant might know what particular charge he is bound to answer. There are many cases where it is not sufficient to describe an offense in the language of the statute creating it. Thus, for obtaining goods, &c., by means of false pretenses, it is necessary to set forth the particular pretense specifically. So in malicious trespass. *Vide The State v. Aydelott*, 7 Blackf. 157. In the case cited, the indictment charged that "the defendant did maliciously and mischievously injure, and cause to be injured, a certain house," &c. The Court say: "The description of the offense is too vague. It is true, that in describing the crime, the indictment adopts the language of the statute creating it. But this mode of setting out an offense is not always attended with the requisite certainty. * * The indictment under consideration should have shown the specific injury done to the house. This was necessary in order to apprise the defendant, with certainty, of the crime with which he was charged, and to enable him to plead the verdict in any future prosecution for the same offense." So in the case at bar, for the same reasons, the particular acts of encouragement should have been set forth in the information.

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V.
THE STATE.

The motion to quash the information should have prevailed. From the view we take of the information, it will be unnecessary, and, indeed, out of place, to express an opinion upon a question involved in the motion for a new trial, and argued by counsel in this Court, as to the applicability of the thirteenth article of our constitution, and the law made in pursuance thereof, to the case of a slave owner residing in a slaveholding state, and passing through our state *in itinere* with his slave, or retaining him here for a temporary purpose merely.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Collins, D. W. Lafollette, J. Payne, and J. Cox, for the appellant.

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HARLAN and Wife v. EDWARDS, Administrator.

HARLAN
v.
EDWARDS.

Where judgment was rendered by default, and no motion was made to set aside the default, nor any proceedings instituted for relief from the judgment, or to review it—*held*, upon the authority of *Blair v. Davis*, 9 Ind. R. 238, that there is nothing for the consideration of the Supreme Court, on appeal.

Tuesday,
December 13.

APPEAL from the *Grant* Circuit Court.

HANNA, J.—Suit upon a note and to foreclose a mortgage, &c. Judgment by default.

It is said the record does not show a service of notice on the defendants. That part of the return of the sheriff, in question, is as follows: "Served as commanded by reading, *September 25, 1857*, as to *A. J. Harlan* and *H. Harlan*." The return is indorsed on the summons which commanded the sheriff to "summon *Andrew J. Harlan* and *Delilah Harlan*." It is insisted that a return showing a service on *A. J. Harlan*, does not show a service on *Andrew J.*, and that the return does not at all show a service on *Delilah*. It is suggested that the return would have been sufficient if the latter branch had been left off, because it could not be served as commanded, unless the service had been upon the persons named in the command; and that after the return was thus complete, an attempt was made by the officer to set forth the names of the persons upon whom the service was had. In that attempt it is evident that, as to one of the defendants, a mistake was made (if the former part of the return was true), in setting forth the initial letter of the first name. It is further insisted that the first and substantive part of the return should be considered the controlling part thereof, and that the last part might be treated as surplusage, or at most as being such a clerical error as might have been amended, to agree with the former part, on motion below, and will be considered here as having been so amended.

We have no doubt the service upon *Andrew J.* is sufficiently shown, and he being the husband, as shown by the record, of the other defendant, she would, perhaps, be considered in Court, as the suit does not affect her separate

property (6 Blackf. 435; 6 Ind. R. 62), even if the above suggestions are not correct; but certainly there is some strength and great plausibility in them.

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1859.

HARLAN
v.
EDWARDS.

Several errors are assigned in reference to the correctness of the proceedings as to Mrs. *Harlan*. It is urged that, as the record shows that she is a married woman, it was error to render a judgment against her for the sale of the mortgaged property, &c., because the record does not show that there was a guardian *ad litem* appointed for her, and proof made, &c. As to the first part of the proposition, we are not aware of any rule of practice under our code of procedure, that would require the defense to be by guardian in such a case as this. To the reverse we have a statute designating the instances in which a married woman can sue and be sued, which contains this clause, "but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years." 2 R. S. p. 29.

As to the second branch of the proposition, the appellants rely upon the case of *Comley v. Hendricks*, 8 Blackf. 189. In that case there was an appearance by the defendants, and the subsequent proceedings were had with reference to that fact. The record in this case moreover informally discloses the fact that after the default there was a trial, and as the evidence does not properly go upon the record, unless placed there by the parties, the presumption would be in favor of the determination of the Court upon such trial (or more properly speaking, under the circumstances, hearing), and that legitimate evidence had been heard to authorize the judgment. *Alexander v. Frary*, 9 Ind. R. 481.

We have thus, at some length, thrown out these suggestions in relation to the questions discussed in this Court, although in point of fact, under the decision in *Blair v. Davis*, 9 Ind. R. 236, there is nothing before us for our consideration. This was a judgment by default, and no motion was made in the Court below to set aside the default, nor were any proceedings instituted to be relieved from the judgment, or to review it. The statutes, and

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FRASIER
v.
HUBBLE.

mode of procedure, upon these points, appear to be ample to enable a party, by an application to the Court where the judgment is rendered, to obtain relief if injustice has really been done. At least the opportunity is presented to a party to have his day to be heard in Court, and if the Court, upon reviewing the proceedings, either formally or informally, should adhere to an erroneous ruling or order, the party aggrieved can then except, and the matter can be brought before us in a proper form. A mere informality, such as might be contained in the return of an officer, could be corrected, and parties would thus be saved the delay, &c., of an appeal to this Court, to obtain the correction of such mere informalities. If the defect could not be remedied, but should be found to be substantial, then the Court should, without doubt, relieve the party from the effects thereof, if not, he would then be compelled to submit to the hardship, &c., of a resort to this Court. But the authority of the Court below should first be invoked, before resorting to an appeal under such circumstances.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

H. S. Kelly, for the appellants.

I. VanDevanter and *J. F. McDowell*, for the appellee.

FRASIER and Wife v. HUBBLE.

Tuesday,
December 13.

APPEAL from the *Kosciusko* Court of Common Pleas.

Per Curiam.—Action to foreclose a mortgage.

The complaint alleges that the appellants, who were the defendants, executed to one *George R. Thralls* a mortgage on certain lands therein described, to secure the payment of 300 dollars, evidenced by two promissory notes, copies of which are filed with the complaint; and that *Thralls* had assigned the notes to *Hubble*, the plaintiff below. It is averred that the notes are unpaid. And the relief prayed

is, that the plaintiff have judgment for 351 dollars, and a sale of the mortgaged property, &c. Nov. Term,
1859.

The record shows that at the *February* term, 1857, one *Andrew J. Power*, an attorney of said Court, and attorney in fact for the defendants, appeared in the same Court, filed a warrant of attorney executed by the defendants, authorizing him to appear and confess a judgment in favor of the plaintiff for 351 dollars; and further, the warrant authorizes a sale of the lands described in the mortgage, for the payment of such judgment, &c.

FRASIER
V.
HUBBLE.

The warrant of attorney is set out in the complaint, and is in the usual form, &c. And, upon the filing of it, the Court rendered a judgment in favor of the plaintiff for 351 dollars with costs, &c., and for the payment thereof, ordered the lands described, &c., or so much thereof as might be necessary for the purpose, to be sold, &c.

These proceedings may be, in some respects, irregular; still there were no exceptions, in any form, taken to the action of the Common Pleas; and there is, consequently, none of the errors assigned on the record properly before us.

If the defendants had, in the first instance, appeared in the lower Court and moved to set aside the judgment and order of that Court, on the ground that its proceedings in the case were irregular, the action of the Court on such motion, might have been the subject of review in this Court; but the record, as it now stands, contains no action of the Common Pleas properly before us. We have often decided that "Where a judgment is taken by default, a motion to set aside the default must precede an appeal to this Court." *Blair v. Davis*, 9 Ind. R. 236.—*Harlan v. Edwards*, at the present term (1). The principle upon which these cases were decided, well applies to the case at bar. The appeal must, therefore, be dismissed.

The appeal is dismissed with costs.

J. S. Frazer and *G. W. Frasier*, for the appellants.

(1) *Ante*, 430.

Nov. Term,
1859.

BERSCH v. THE STATE.

BERSCH
v.
THE STATE.

13	434
157	60
13	434
167	235

Indictment for passing counterfeit money. A witness was permitted to testify that the wife of the defendant had sold to him a counterfeit twenty dollar bill belonging to defendant, in his absence, but that the defendant was subsequently advised of the transaction and sanctioned it. This was not the bill for which he was indicted; but the transaction was about the time of the offense alleged. *Held*, that the testimony was admissible as tending to show knowledge on the part of the defendant that the bill passed by him was counterfeit.

The declarations of a witness, as to his place of residence, are not always immaterial, touching his credibility; but in this case, the previous statement proposed to be proved does not appear to materially conflict with that proposed to be impeached.

A witness, in this case, was asked if he had not passed a counterfeit bill as a genuine one in *L.*, and what he had sworn about it on a former occasion. The Court ruled the question inadmissible. *Held*, that there was no error. But, *held*, also, that perhaps the Court might, in its discretion, have let the question go to the witness under proper advice.

It is always proper to ask a witness as to his relationship to the parties, and the state of his feelings towards them, with a view that the jury may judge of the impartiality of his testimony.

The Court, in this case, instructed the jury that the question whether a certain witness had counterfeit money in his possession or not, had nothing to do with the guilt or innocence of the accused. *Held*, correct as an abstract proposition; but, *held*, also, that such fact might have had a bearing upon the credit of the witness, or not, depending upon the further question whether the counterfeit money was properly or improperly in his possession; and if the evidence tended to show that the money was in his hands for an improper purpose, the defendant should have asked an additional instruction applicable to the facts, in order to put himself in a position to complain of that given.

A new trial will not be granted in a criminal case, because the jury, without the permission of the Court, took to their room papers which were given in evidence, if, so far as appears, the papers were taken inadvertently, without improper intervention by any person, and it is not shown that the jury made any use of them.

Wednesday,
December 14.

APPEAL from the *Switzerland* Circuit Court.

PERKINS, J.—An indictment against *Bersch* for passing counterfeit money. Conviction and sentence to the penitentiary.

A change of venue was taken in the case; and it is claimed that the record does not show that the original indictment was transmitted with the transcript upon the

change. This objection raises a question of fact. We think it appears that the original indictment was transmitted. This is the fair inference from the entry of the clerk; and, further, it appears that the defendant made a motion in the Court, to which the change was granted, to quash the indictment, &c.

Nov. Term,
1859.

BENSON
V.
THE STATE.

The principal witness on the part of the state was *Michael Deckhard*. He testified that the defendant's wife sold to him a twenty dollar counterfeit bill belonging to the defendant, in his absence; but that the defendant subsequently was advised of the transaction, and sanctioned it. This was not the bill for the passing of which the defendant was indicted. The evidence was admissible as tending to show knowledge on the part of the defendant that the bill passed by himself was counterfeit, as the transactions were about the same time. *Mc Cartney v. The State*, 3 Ind. R. 353.

Deckhard testified that he had been selling goods some time prior to the then trial, for himself; that he had also clerked for one Mr. *Judah*, in *Monroe* county; and that he was then superintending a flat-boat. The defendant then, on cross-examination, proposed to ask him if he did not swear, on the preliminary examination before Esq. *Brooke*, "that previous to the time when this offense was alleged to have been committed," he had no regular employment or place of abode; but the Court refused permission on the ground that it was an immaterial point. We are not prepared to say that the declarations of a witness, as to his place of residence, would always be immaterial, touching his credibility; but we think no error is shown in this case, as the previous statement proposed to be proved does not appear to materially conflict with that made on the trial of this cause; nor was the time fixed, in the question proposed, with sufficient precision. "Previous to the time," &c., without stating how long previous, would seem to be too indefinite.

The defendant proposed to ask the witness, further, if he had not passed a counterfeit bill as a genuine one, in *Louisville, Kentucky*, and what he had sworn about it on

Nov. Term,
1859.

BERSON
v.
THE STATE.

a former occasion; but the Court ruled the questions inadmissible, and we think the ruling not error, though, perhaps, the Court might, in its discretion, have let the question go to the witness under proper advice.

If the defendant relied upon the answers to impeach the character of the witness, then he was attempting to violate the rule that evidence for that purpose should not go to particular acts, but to general character. If the object was to lay the foundation for a contradiction of the witness, it seems to us that such contradiction would have been in violation of the rule that it must be as to matters relevant to the issue. See 1 Greenl. Ev., p. 613, note 3.

We do not think the case falls within that of *Newton v. Harris*, 2 Seld. 345. It is always proper to ask a witness as to his relationship to the parties, and the state of his feelings towards them, with a view that the jury may judge of the impartiality, or otherwise, of his testimony.

The Court instructed the jury, that the question whether the witness, *Deckhard*, "had counterfeit money in his possession or not, had nothing to do with the guilt or innocence of the accused."

As an abstract proposition, this instruction was correct; but such fact might have had a bearing upon the credit of the witness, or might not, depending upon the further fact of whether the counterfeit money was properly or improperly in his possession. And if there was evidence tending to show that such money was in the hands of the witness for an improper purpose, the defendant should have asked an additional instruction applicable to the facts, in order to put himself in a situation to complain of that given. *Postlethwaite v. Payne*, 8 Ind. R. 104.

The jury took to their room two papers which were given in evidence on the trial. The papers, so far as appears, were taken inadvertently, without the permission of the Court, it is true, but through no improper intervention of any person, and it is not shown what, or whether any use was made of them by the jury, in their deliberations. The facts do not present a case for a new trial. *Ball v. Carley*, 3 Ind. R. 577.

Per Curiam.—The judgment is affirmed with costs.

H. W. Harrington, for the appellant.

J. E. McDonald, Attorney General, and *A. L. Roache*, for the state.

Nov. Term,
1859.

RUGG
v.
JOHNSON.

RUGG v. JOHNSON.

APPEAL from the *Knox* Court of Common Pleas.

Wednesday,
December 14.

Per Curiam.—On the 4th of *February*, 1858, *John M. Buchanan* procured from the *Knox* Court of Common Pleas a writ of attachment against *Dwight W. Johnson*, by virtue of which certain property belonging to *Johnson* was seized. *Johnson* gave bond for the delivery of the property, and retained possession of it. On the 22d of *February*, he sold the property to a buyer from *St. Louis*. On the 12th of *March*, 1858, *Rugg* filed a claim under *Buchanan's* attachment. On the 23d of *March*, *Buchanan* dismissed his attachment. Afterwards, *Rugg* obtained judgment on his claim, but the Court decided that the attachment, as to his claim, was not a lien on the goods, and, hence, that he could only have a judgment *in personam*, and not *in rem*, for the sale of the attached property. In this the Court erred. Ind. Dig. 148.

The judgment, in this particular, is reversed with costs. Cause remanded, with instructions to the Court below to order a sale of the property attached.

S. Judah, for the appellant.

J. P. Usher, for the appellee.

Nov. Term,
1859.

CREWS and Others v. CLEGHORN and Another.

CREWS
v.
CLEGHORN.

A defendant constructively summoned has a right to appear and defend at any time before final judgment in the cause.

An order for the sale of land of a deceased person, by the proper Court, is not a final judgment.

The simple dismissal of a suit is no bar to another suit upon the same cause of action.

Quære, whether, where land is reserved to an *Indian*, and restricted from sale without the consent of the president of the *United States*, a Court, after the death of such *Indian*, can order the land to be sold without the consent of the president.

Wednesday,
December 14.

APPEAL from the *Laporte* Court of Common Pleas.

PERKINS, J.—In 1826, there was granted, by the *United States*, to *Ann Sharp*, an *Indian* woman, a tract of land in *Laporte* county. The grant was contained in the terms of an *Indian* treaty, made at the mouth of the *Mississinewa* river, in *Indiana*, and was coupled with this restriction, viz., that the land so granted should never be conveyed by the said *Ann Sharp*, or her heirs, without the consent of the president of the *United States*. U. S. Stat. at Large, vol. 7, pp. 295 to 299. Subsequently *Ann Sharp* married *Luther Rice*, and bore him a son named *William M. Rice*, in the *Indian* territory west of the state of *Missouri*. *Luther Rice* died. His widow, once *Ann Sharp*, married *William W. Cleghorn*. Subsequently she died, leaving no child by *Cleghorn*. *Cleghorn* alleged that she made a will, and he procured probate of it in *Missouri*. He then came to *Laporte* county, *Indiana*, and applied for an order to sell the land granted to *Ann Sharp* by the treaty above named. He made publication against *William M. Rice*, sole heir of *Ann*, then being a resident in the *Indian* country west of *Missouri*.

The *Laporte* Common Pleas Court ordered a sale, and it was made. In the meantime, *William M. Rice*, the heir of *Ann Sharp*, sold the land, with the approbation of the president of the *United States*, to *Crews* and *Sherman*. Subsequently *Rice*, *Crews*, and *Sherman* appeared in Court and applied to have the proceedings for the sale of the land

set aside. Afterwards they dismissed their proceedings, and the Court set aside the sale.

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1859.

Cleghorn then renewed his motion for an order to sell the land, and *Rice*, *Crews*, and *Sherman* opposed it. But the Court seems to have been of the opinion that they had no right to be further heard, and, therefore, refused to give instructions asked by them, or to require the jury to find specially upon questions propounded, &c.

CREWS
V.
CLEGHORN.

The code provides that a defendant constructively summoned, shall be allowed, at any time before judgment, to appear and defend the action; and upon a substantial defense being disclosed, time may be given on reasonable terms, to prepare for trial. 2 R. S. p. 125.

In this case, *Rice*, one of the defendants, was constructively summoned; and the others, who claimed the right to appear as defendants, derived title through him, and were proper parties-defendant.

The statute above quoted, we have no doubt, gives the right to appear and defend till final judgment.

The order to sell was not such. *Staley v. Dorset*, 11 Ind. R. 367.

This being the case, when the sale that had been made was set aside, the defendants, upon showing, as they did, sufficient grounds, should have been let in to answer the complaint for the order of sale, and to defeat the application for it entirely, if, upon all the facts of the case, it ought not to have been made, or to be continued. They were not estopped from doing this by anything appearing in the previous proceedings in the suit. The simple dismissal of a suit is no bar to another for the same cause.

The question has been suggested, how the executor of *Ann Sharp* can procure the sale of land, which she could not have made herself without permission of the president? The question is a grave one, which we will not consider till it has been argued. See *Doe v. Beardsley*, 2 McLean, 412; *Verden v. Coleman*, 4 Ind. R. 457; *Doe v. Avaline*, 8 *id.* 6; *Harris v. Doe*, 3 *id.* 494.

The judgment below is reversed with costs, and the proceedings set aside to the complaint, with leave to the de-

Nov. Term, 1859. fendants to answer it as fully as they might have done had they appeared to it before any order of sale was made.

WITHEROW v. HIGGINS. *Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles and J. A. Liston, for the appellants.

WITHEROW and Another v. HIGGINS.

A suit under the statute regulating proceedings supplementary to execution, is not a proper mode of setting aside an illegal sale.

Wednesday,
December 14.

APPEAL from the *Hendricks* Court of Common Pleas.

HANNA, J.—This was a proceeding by appellants, on affidavit and complaint, under the statute, 2 R. S. p. 152, regulating proceedings supplementary to execution.

The affidavit alleges, first, that appellants had recovered, &c., a judgment for 56 dollars, against one *James H. Moody*; second, that they had caused an execution to be issued, &c., which was not yet returned; third, that defendant had in his possession a mare, worth 80 dollars, the property of said *Moody*, which defendant had levied upon by virtue of an execution, against one *Denny*, for 13 dollars, said execution having been a lien upon said property before *Denny* sold it to *Moody*. *Higgins* is made a defendant, and asked to answer, &c., and to apply the overplus arising from the sale of said property, after the payment of said execution for 13 dollars, upon the judgment of plaintiffs.

Afterwards, and before answer, a complaint was filed alleging that *Higgins*, to defraud plaintiffs, had, on the day said property was by him advertised for sale, sold the same in an improper and hasty manner, after the payment of the amount due on said execution, to one *Robins* for the sum of 18 dollars.

There was a demurrer filed to the complaint for want of

proper parties, and because the facts stated were insufficient, &c. The demurrer was sustained. Judgment for the defendant.

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1859.

ARMITAGE
V.
THE STATE.

See 11 Ind. R. 329, for the section of the statute under which the proceeding was had.

Whatever might have been the fate of the application if it had been made to depend upon the affidavit alone, without an averment of want of other property, we need not decide, as the filing of the complaint disclosed the fact that the property had passed out of the hands of *Higgins* by sale. We think this is not the proper mode of testing the question of good faith and legality of the proceedings upon the sale, by an officer.

If the sale was legal, it was, perhaps, the misfortune of the plaintiffs that they did not attend and make the property bring enough to cover their debt. If it was not legal, or if plaintiffs were, by the wrongful act of the officer, prevented from bidding, they may have a remedy, but we do not think it is in this form.

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave and *J. Witherow*, for the appellants.

13	441
194	308

ARMITAGE v. THE STATE.

Where an indictment for having in possession counterfeit bank notes, alleges that they are in the defendant's possession, a sufficient excuse for the want of a particular description of the notes is shown.

On the trial, the defendant cannot be compelled to furnish evidence against himself by producing the notes.

But, nevertheless, the contents of the notes cannot be proved by parol evidence, on the trial, unless notice to produce them has been given, according to the rule of practice in civil cases.

APPEAL from the *Lagrange* Circuit Court.

Wednesday,
December 14.

HANNA, J.—Indictment for forgery. Trial and conviction.

Nov. Term,
1859.

A motion to quash the indictment was made, overruled, and exceptions taken.

ARMITAGE
v.
THE STATE.

It is charged in the indictment, that on, &c., at, &c., the said defendant "feloniously did have in his possession forty forged, false, and counterfeit five dollar bank notes, purporting to be five dollar bank notes issued by the *Market Bank*." It is then again alleged that they were counterfeit notes; and that they were in the possession of the defendant, and, therefore, a more particular description was to the jurors unknown, &c.; that he possessed them with intent to put them in circulation, &c., well knowing, &c.

It is insisted that the description of the notes is insufficient; and we are referred to *The State v. Atkins*, 5 Blackf. 458, in which it was held that, "in cases of forgery, or of knowingly uttering counterfeited instruments of writing, the indictment must profess to set out an exact copy of the counterfeit, that the Court may see that it is one of those instruments the false making or passing of which is punishable by law." In that case, it was held insufficient to aver, preceding the copy of the note set forth, that it was "of the following purport and effect, to-wit;" but that averment must be direct that the instrument was to the "tenor following," or "as follows," &c.

In answer to this, it is said that the case in 5 Blackf. is not applicable to a state of facts similar to those in the case at bar.

It has been often decided, and appears to be in accordance with the text of some writers on criminal law, that "where the instrument upon which the indictment rests is in the defendant's possession, or is lost or destroyed, it is sufficient to aver such special facts as an excuse for the non setting out of the instrument, and then to proceed, either by stating its substance, or by describing it as an instrument which the said inquest cannot set forth by reason," &c., "of its loss," &c. Whart. Crim. Law, pp. 311, 608, and authorities there cited.

We are of opinion the motion to quash was properly

overruled. The reason for not setting out the notes with more particularity, appears to us sufficient.

Nov. Term,
1859.

The next point made in the brief is, that a witness was permitted to testify that he "sold the defendant 200 dollars in counterfeit bills, being four and five dollar bills on the *Market Bank of New York*."

ARMITAGE
v.
THE STATE.

It is insisted, first, that the bills should have been produced, or notice given to the defendant to produce them; and, second, that the witness should not, under the statute, have testified as to the genuineness of the bills, unless it was first shown that he was a person of skill. 2 R. S. p. 372, § 91.

If the notes were really in the possession of the defendant, as alleged in the indictment, the Court could not compel him to produce them on the trial, for the reason that he might be, and if the charge was true, certainly would thereby be, furnishing evidence against himself.

Upon the next branch of the objection, there are two classes of decisions. Those of the *English* Courts, which have, pretty uniformly, held that there ought not to be any difference in the rule, in that respect, between civil and criminal procedure; that in either, secondary evidence of the contents of a writing, &c., should not be received until notice to the opposite party has been given to produce it upon the trial, when it is shown to be in the possession of such party. *Rex v. Gibson*, Rus. and Ryan, 138.—*Rex v. The Inhabitants of Rawdon*, 8 B. and C. 708.

In this country, it has been repeatedly decided that the indictment itself is all the notice the defendant can require in a criminal case, in regard to the instrument which is the subject of the offense; that if the instrument is so described as to enable the defendant to obtain an advantage by the production thereof, doubtless he would do so, and that it would be to his injury, before the jury, to show, on the trial, that a special notice to produce it had been given, and the defendant had failed to respond to it. *The People v. Kingsley*, 2 Cow. 522.—*The People v. Badgley*, 16 Wend. 53.—*The State v. Potts*, 4 Halst. 26.—*Pendleton*

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^{v.}
THE STATE.

v. The Commonwealth, 4 Leigh, 694.—*The People v. Holbrook*, 13 Johns. 90.—*The Commonwealth v. Messenger*, 1 Binn. 273.

The opinions in the last cited case are able, and rest upon the argument that it is useless to give a notice where the production could not be compelled; and that when the instrument, upon which the indictment was founded, was traced into the hands of the defendant, it was beyond the control of the Court or the prosecutor, and secondary evidence should be admitted of its contents, the same as if it was lost or destroyed, for it should be so considered for all purposes of evidence.

We are not able to perceive any convincing argument in regard to criminal cases as distinguished from civil. The rule of evidence should be uniform in both classes of cases, where, upon general principles, it can be made so. If an indictment is a sufficient notice, why not a complaint, on an instrument averring that it is in the hands of the defendant? Yet we are not aware of any well settled rule that would dispense with the necessity of notice to produce the writing, in the civil case, where it is necessary to use it as evidence.

We, therefore, prefer to follow the rule of practice, which requires actual notice to produce an instrument, traced to the hands of the defendant and not shown to be lost or destroyed, believing it to be more in consonance with the settled rules of practice upon kindred questions.

Upon the second branch of the objection, we are of opinion that the statute referred to, requiring the evidence of a certain number of experts, is not applicable to the case at bar.

In this case, in addition to the confessions of the defendant that he had in his possession counterfeit notes, &c., the state was permitted to prove, by a witness, that he sold the defendant counterfeit bank notes. It was the statement of a substantive fact, namely, that the notes were counterfeit. If he either manufactured them, or caused another to do it for him, he could state the fact from his own knowledge. No degree of skill, in reference

to genuine or counterfeit notes, was necessary to enable him to say, under such a supposed state of facts, that they were not genuine.

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1859.

HARRIS
v.
OSENBACK.

The statute was made to meet a case where a note is presented to a witness for the purpose of ascertaining, from an inspection of the note itself, as to whether it is genuine or not. In such an instance, the witness should be an expert, or his evidence should not be received.

Per Curiam.—The judgment is reversed, and the clerk directed to issue the proper order to the keeper of the state prison to remand, &c.

W. L. Stoughton and *A. Ellison*, for the appellant.

J. E. McDonald, Attorney General, and *A. L. Roache*, for the state.

13	445
165	25

HARRIS and Another v. OSENBACK.

APPEAL from the *Hamilton* Court of Common Pleas. *Wednesday, December 14.*

Per Curiam.—Suit upon a note. Judgment for plaintiff, by default, for 148 dollars, 25 cents.

The errors assigned are, that the judgment is for 21 dollars, 78 cents too much; and that the complaint does not appear to have been subscribed by either the plaintiff or his attorney, as required by the statute. 2 R. S. p. 43.

The plaintiff offers, in this Court, to remit the excess for which judgment was taken. The failure to subscribe the complaint is such a merely formal or clerical error as the plaintiff should have been permitted to amend, when pointed out in the Court below, and will be considered as amended here.

If the plaintiff should remit the excess, the judgment is affirmed at the cost of the appellee, incurred in this Court; if the excess is not remitted, the judgment is reversed, &c.

D. C. Chipman, for the appellants.

E. S. Stone, *D. Moss*, and *J. N. Evans*, for the appellee.

Nov. Term,
1859.

BERRY v. BERRY and Others.

CRANE
v.
THE EVANS-
VILLE INSUR-
ANCE CO.

Wednesday,
December 14.

APPEAL from the *Delaware* Court of Common Pleas. *Per Curiam*.—Petition for partition, by the appellees against the appellant and others. There was judgment awarding partition, and commissioners appointed to make such partition, and from this interlocutory judgment or order, the appeal is taken, there having been no return made by the commissioners, and the proceeding not having been finally disposed of by the Court below. In such case no appeal lies to this Court. This was settled in *Griffin v. Griffin*, 10 Ind. R. 170.

The appeal is dismissed at the cost of the appellant.

W. March, for the appellant.

J. R. Buckles and ——— *Shipley*, for the appellees.

CRANE and Another v. THE EVANSVILLE INSURANCE COM-
PANY.

Where a policy of insurance is an open one, and is for the insurance of such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary, in a pleading based upon the policy, against the insurance company, to aver that an amount had been mutually agreed upon and indorsed upon the policy.

Wednesday,
December 14.

APPEAL from the *Vanderburgh* Court of Common Pleas.

WORDEN, J.—Action by the company against the appellants upon a promissory note. Answer by way of set-off claiming a balance in favor of the defendants.

The answer seeks to recover from the company the amount of certain freight, insured upon a steamboat, which it is alleged was grounded and unable to make the voyage, whereby it was claimed that the company became liable for the freight. The policy, bearing date

December 27, 1852, insures the owners of the boat in such sums as may be indorsed on the policy, upon the freight list and charges for the steamer season of 1853, and provides that the sums, &c., to be insured "shall be specified by application and mutually agreed upon and indorsed upon the policy." The policy is set out, and on the back of it there is an indorsement as follows, viz.:

Nov. Term,
1859.
CRANE
V.
THE EVANS-
VILLE INSUR-
ANCE CO.

Proposition.	Date.	Amount.	Rate.	Premium.
		\$2,406 74, freight list and charges per <i>Evansville to New Orleans.</i>	$\frac{1}{2}$	\$12 03

A demurrer was sustained to the answer, and there was final judgment for the plaintiff. The ruling of the Court on the demurrer, is the only error assigned.

We have set out enough only of the answer to present one of the points relied upon by the appellee to sustain the ruling below, which is, that it does not appear, either by direct averment or necessary implication, that the sum to be insured, upon the voyage in question, had been "mutually agreed upon" and indorsed upon the policy by the consent of the company. This objection to the answer appears to be well taken. The indorsement upon the policy does not purport to have been made by the company. It is not signed by any one, nor is it averred that the amount, &c., therein specified, had been mutually agreed upon as provided in the policy. By the terms of the policy, the company are not bound beyond what should be mutually agreed upon and indorsed upon the policy; and such mutual agreement should appear affirmatively in order to render the company liable. This point being, in our opinion, well taken, we shall not examine whether, supposing the answer to be otherwise valid, the company would be liable on the facts set up in the answer. Such examination would be useless, as the judgment must be affirmed for the reason indicated.

Per Curiam.—The judgment is affirmed with costs.

J. G. Jones and *J. E. Blythe*, for the appellants.

C. Baker, for the appellees.

Nov. Term,
1859.

BOWLES *v.* PLUMMER.

COLLINS
v.
MAKEPEACE.

Wednesday,
December 14.

APPEAL from the *Orange* Circuit Court.

Per Curiam.—Complaint by *Plummer* against *Bowles* for the specific performance of a contract for the sale of certain real estate. Demurrer to the complaint overruled. Answer filed and issues formed.

Trial by the Court, finding and judgment for the plaintiff, a new trial being refused.

The errors assigned relate to the ruling on the demurrer, and the motion for a new trial. No objection to the complaint has been pointed out in the brief of counsel, and the evidence is not in the record. Evidence is set out, but there is no statement in compliance with rule 30 that "this was all the evidence given in the cause." This statement is technical, and indispensable to repel the presumption of other evidence.

The judgment is affirmed with costs.

J. Collins, J. Cox, and J. Payne, for the appellant.

COLLINS *v.* MAKEPEACE.

In a suit upon a promissory note, a defense seeking to avoid the entire contract for usury, without showing what amount of illegal interest it includes, is bad.

Where the complaint counted upon a note and an account stated, a defense alleging that the note was given by the defendant, and received by the plaintiff, in payment of the account, was held good, although it also charged an alteration of the note, and was not verified by oath.

Suit upon a promissory note. Answer as follows: "Defendant admits that he executed the note filed with, and referred to in the first count of the complaint; but he avers that after its execution and delivery, the same was altered without his consent or knowledge, in this: '20' before 'day' was changed to '22;' the word '*August*' was stricken out, and the word '*March*' written above it, which has also been obliterated. So the defendant did not execute said note as it now is filed with said Court, and shown to him." This defense was verified by oath. And the plaintiff replied thus: "Said

note was not made payable on the 20th day of *August*, 1853, as in the second paragraph alleged; but was made payable on the 22d day of *August*, by the draftsman, S., through inadvertence—it being, at the time of making the note, expressly understood between the parties that a judgment should be taken at the term of the Court then in session, upon the note. And upon discovering that, owing to the time he, S., had made the note payable, such judgment could not then be taken, and still having the same note in his possession, he struck out the word '*August*' without the knowledge or consent of the plaintiff, of which he immediately notified the defendant, who objected to such alteration being made, whereupon he, S., at the request of the defendant, then and there struck out the word '*March*' and restored the word '*August*,' as written at the time the note was executed, with which the defendant then and there expressed himself satisfied, and agreed to the note being then as it originally stood." *Held*, that the reply was good.

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COLLINS
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Complaint in two counts, first, upon a note, and second, upon an account stated. The answer set up to the first count, usury, alterations, &c., and to the second, that the note had been given in payment of the account. Verdict "for the plaintiff on the counting, 166 dollars, 50 cents, without interest on said claim, regarding said note invalid." The evidence was not in the record on appeal. *Held*, that the verdict, though informal, is substantially for the defendant on the first count, and for the plaintiff on the second.

APPEAL from the *Delaware* Circuit Court.

Wednesday,
December 14.

DAVISON, J.—The appellee was the plaintiff below, and *Collins* was the defendant. The complaint contains two counts. The first is upon a promissory note in these words:

"On or before the 20th day of *August*, 1853, I promise to pay *Allen Makepeace* 166 dollars and 50 cents, value received, waiving the appraisement laws of *Indiana*, to draw 6 per cent. from date. *March* 22, 1853.

"*Elijah Collins*."

The second count is upon an account stated, under which there is filed a bill of particulars in this form:

"*Elijah Collins*, to *Allen Makepeace*, Dr.:

"*March* 22, 1853. To balance due me on settlement of that date on a note executed by

you and *Rhoda Barret*,..... \$166 50"

Defendant's answer contains seven paragraphs. The first, second, third, fourth, and seventh, are to the first count of the complaint, and the fifth and sixth, to the second count.

Demurrers were sustained to the fourth, fifth, and sixth

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paragraphs, and to the other paragraphs there were replies.

The fourth paragraph alleges, "that one *Andrew Collins* being desirous of borrowing money of plaintiff, and he being desirous of lending money to said *Andrew*, at a greater rate of interest than is allowed by law, this defendant, together with one *Rhoda Barret*, executed their promissory note to said *Andrew*, without any consideration, for 400 dollars, dated *October 11, 1849*, due in twelve months, with interest from date, which note said *Andrew* afterwards assigned to said plaintiff, he, the plaintiff, having full knowledge that said note was given without consideration in the manner aforesaid, for the purpose of being so sold to him, and plaintiff, at the time of the assignment, gave to said *Andrew*, for said note, but 300 dollars. So the plaintiff, in manner aforesaid, corruptly and unlawfully loaned to said *Andrew*, in manner aforesaid, money at a greater rate of interest than is allowed by law; and afterwards, on the 22d of *March, 1853*, said *Rhoda* paid the plaintiff on said note the sum of —, and the defendant executed to the plaintiff the note sued on, as a part payment of said first-mentioned note, the same being given as such payment, and for no other consideration. So the note sued on was given for unlawful and usurious interest, and without consideration, of which the plaintiff had full notice."

This defense is evidently defective.

The statute on the subject of interest does not render the contract upon which an illegal rate of interest is reserved, wholly void, but simply avoids it so far as it reserves the interest. R. S. 1843, p. 581, § 29.—1 R. S. p. 344, § 4.

The defense, then, is objectionable, because it seeks to annul the entire contract sued on, without showing how much or what amount of illegal interest it includes. To bring such a defense within the statute, it is essential that the amount of interest included in the note should appear on the face of the pleading. *Hays v. Miller*, 12 Ind. R. 187.

The fifth paragraph is as follows: "The note declared on was given by the defendant, and received by the plaintiff, in payment and satisfaction of the account stated, as set forth in the second count of the complaint, and when executed to the plaintiff by the defendant, was due the 20th of *August*, 1853; but after such execution, said note was, without the knowledge or consent of the defendant, so altered by the plaintiff as to become due the 22d of *March*, 1853."

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MAKESPACE.

This defense, it is insisted, is demurrable, because that branch of it which alleges the alteration of the note without the assent of the defendant, is not verified by oath. We think otherwise. So far as the defense relates to such alteration, it may be ineffective. Still the first branch of the paragraph, viz., that "the note declared on was given by the defendant, and received by the plaintiff, in payment and satisfaction of the account stated, as set forth in the second count," is, in our opinion, well pleaded, and constitutes a sufficient bar to a recovery upon the stated account. If, as alleged in the defense, and admitted by the demurrer, the note was given by the defendant in payment and satisfaction of the account, and so received by the plaintiff, the account was merged in the note, and had no longer an existence, as a legal demand against the defendant.

The sixth paragraph is, in effect, the same as the one just considered, and is, consequently, subject to the same rule of decision.

The following are the facts set up in the second paragraph:

"Defendant admits that he executed the note filed with, and referred to in, the first count of the complaint; but he avers that after its execution and delivery, the same was altered without his consent or knowledge, in this: '20,' before 'day,' was changed to '22;' the word '*August*' was stricken out, and the word '*March*' written above it, which has also been obliterated. So the defendant did not execute said note as it now is filed with said count, and shown to him."

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This defense was verified by oath. And the plaintiff replied thus:

"Said note was not made payable on the 20th day of *August*, 1853, as in the second paragraph alleged; but was made payable on the 22d day of *August*, by the draftsman, *John H. Swaar*, through inadvertence—it being, at the time of making the note, expressly understood between the parties that a judgment should be taken at the term of the Court then in session, upon the note. And upon discovering that, owing to the time he, *Swaar*, had made the note payable, such judgment could not then be taken, and still having the same note in his possession, he struck out the word '*August*' without the knowledge or consent of the plaintiff, of which he immediately notified the defendant, who objected to such alteration being made, whereupon he, *Swaar*, at the request of the defendant, then and there struck out the word '*March*' and restored the word '*August*,' as written at the time the note was executed, with which the defendant then and there expressed himself satisfied, and agreed to the note being then as it originally stood."

To this reply the defendant demurred; but his demurrer was overruled.

We perceive no valid reason why this reply should be deemed objectionable. *Swaar*, who drew the note, still having it in his possession, changed its time of payment so as to correspond with what he understood to be the intent of the parties when it was executed. This, to say the least of it, was an act that cannot be justified; but it was done without the assent or knowledge of the plaintiff, by a stranger to the instrument, and did not, therefore, so operate as to avoid the contract. 1 Greenl. Ev., § 566, note 1. There can, however, be no doubt as to the validity of the reply, when it is noted that the defendant was informed of the alteration, and, at his suggestion, the note was restored to the same condition in which it originally stood. The demurrer was correctly overruled.

The issues were submitted to a jury, who returned a ver-

dict in these words: "We, the jury, fined for the plaintiff on the counting, 166 dollars, 50 cents, without interest on said claim, regarding said note invalid."

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v.
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Motions for a new trial, and in arrest, were overruled, and judgment rendered on the verdict.

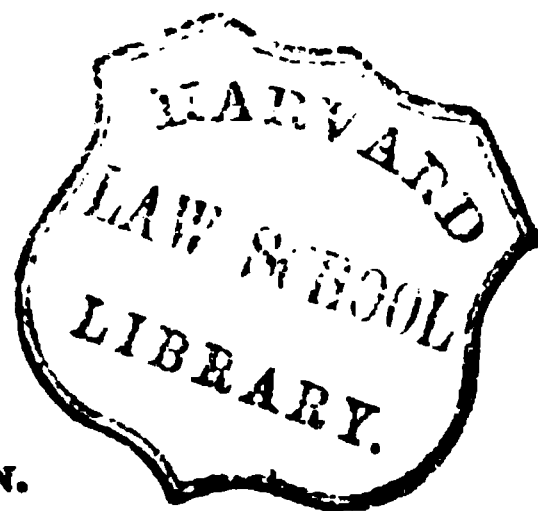
The evidence not being in the record, we must presume that the finding of the jury accords with its weight; but it is insisted that the verdict itself is defective—that it does not conform to the issues. We are not inclined to adopt that conclusion. The verdict, it is true, is very informal; but it finds substantially for the defendant on the first count of the complaint, and for the plaintiff on the second count. This seems to cover the whole controversy between the parties.

For the errors in sustaining the demurrers to the fifth and sixth paragraphs of the answer, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the appellant.

T. J. Sample, for the appellee.



LASSELLE and Another v. WILSON.

APPEAL from the *Cass* Court of Common Pleas.

Wednesday,
December 14.

Per Curiam.—The appellee, who was the plaintiff below, brought an action against *Lasselle* and *Aldrich*, upon a promissory note for the payment of 100 dollars.

The record shows that the defendants, having been duly served with process, were called, and a regular default taken against them, and judgment by default accordingly rendered.

As no motion to set aside the default appears to have been made in the Common Pleas, this appeal is not properly before us. See *Blair v. Davis*, 9 Ind. R. 236; *Har-*

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lan v. Edwards, at the present term (1). Where a judgment is taken by default, a motion to set aside the default must precede an appeal to this Court. *Blair v. Davis*, *supra*.

The appeal is dismissed with costs.

D. D. Pratt, for the appellants.

(1) *Ante*, 430.

MATSON v. JONES and Others.

Wednesday,
December 14.

APPEAL from the *Vermillion* Court of Common Pleas. *Per Curiam*.—In this case, no brief has been filed by either party. The errors assigned on the record are, therefore, considered as waived. See rule 28 of this Court; Perk. Pr. 331.

The judgment is affirmed with costs.

S. B. Gookins, for the appellant.

E. S. Terry, for the appellees.

HARDING v. MANSUR and Another.

An affidavit for an appeal from the judgment of a justice of the peace in a suit upon a forfeited delivery bond, must show, by a statement of facts, that the party has merits in the appeal.

Quære, as to facts that might be sufficient.

A party will not be allowed to amend his affidavit, in such a case, in the appellate Court.

Thursday,
December 15.

APPEAL from the *Marion* Court of Common Pleas.

PERKINS, J.—Suit upon a forfeited delivery bond. The suit was commenced and prosecuted to judgment before a justice of the peace.

The summons in the case was issued on the 14th of *August*, 1857, and was returnable on the 22d of the same month. On that day, both the plaintiffs and defendant appeared, and the cause was continued to the 29th of *August*. On that day the parties again appeared, and the defendant made certain motions touching the cause of action, &c., which were overruled, the cause was tried, and judgment rendered for the plaintiffs.

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It should be observed that the delivery bond was not signed by the execution-defendant, but only by his surety. No motion for a new trial was made before the justice. On the 20th of *September*, 1857, *Noah Harding*, agent for *Elizabeth Harding*, the surety in the delivery bond, and the judgment-defendant, in the suit upon it before the justice, appeared, prayed an appeal, and made oath that said *Elizabeth Harding*, "the defendant, has merits in the aforesaid appeal, and further saith not." [Signed] "*Noah Harding*."

On this affidavit, accompanied by a bond, the justice allowed an appeal to the Common Pleas. In that Court, the plaintiffs moved that the defendant's appeal be dismissed on account of the insufficiency of the affidavit on which it was granted, and the motion was sustained.

The defendant's attorney then asked leave to file, in the Common Pleas, an amended affidavit for an appeal. This the Court refused, and the defendant appealed to the Supreme Court.

Three questions arise—

1. Was the affidavit filed for an appeal sufficient?
2. If not, might it have been amended in the Common Pleas?
3. If the affidavit was there amendable, was the amendment offered sufficient?

1. The statute provides that in suits on delivery bonds, no appeal shall be allowed a defendant from a judgment before a justice, "unless he show, by affidavit, that he has merits in such appeal." 2 R. S. p. 468, § 90.

The affidavit must show, under this statute, the merits in the appeal; it will not be enough that it asserts that a

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party has merits, it must show them; that is, set out the facts, constituting the merits, in the affidavit. This was not done in the affidavit filed in this case, and it was insufficient, therefore, to authorize an appeal.

2. On the second point, it is the opinion of the Court that, in cases of this kind, the affidavit cannot be amended on appeal. A good affidavit must be filed within thirty days after judgment.

3. As to whether that offered was sufficient. It stated facts tending to make out a defense to the suit upon the bond; but it did not state any excuse for failing to set up those facts, in defense of that suit, before the justice, nor any excuse for failing to make them the ground of a motion for a new trial. Now, it could hardly be said that a party who voluntarily neglected to bring forward an existing defense to a suit, in the first instance, and voluntarily neglected to make it a ground for a motion for a new trial, could have much merits in an application for an appeal to another tribunal to obtain a further trial in which he still might not bring forward his alleged defense, but would postpone, for a long time, the payment of the demand against him. Such a practice would scarcely be in harmony with the spirit and intention of the statute in relation to appeals in suits upon delivery bonds. It would but encourage tricks for delay. What is said on this third point is the view of one of the judges only.

It is doubted if the motion for leave to amend was not made too late, being after judgment of dismissal.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

J. Milner, for the appellant.

W. Wallace and *B. F. Harrison*, for the appellees.

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1859.

GOODHUE v. PALMER.

GOODHUE
v.
PALMER.

Time given to the principal in a promissory note upon a usurious contract, without the consent of the surety, does not discharge the surety.

But the surety, in a suit against him, may set off the amount of usurious interest paid by the principal.

When a judgment is rendered against two defendants, before a justice of the peace, and but one of the defendants appeals to the Circuit, or Common Pleas Court, the defendant not appealing, is no party to the suit in the appellate Court, and may be a witness in that Court, for the defendant prosecuting the appeal.

APPEAL from the *Laporte* Circuit Court.

Thursday,
December 15.

PERKINS, J.—*Palmer* sued one *Barker*, and *Goodhue*, the appellant, before a justice of the peace, on a promissory note. *Barker* was the principal in the note, and *Goodhue* the surety. Judgment against the defendants before the justice. No appeal was taken by *Barker*. *Goodhue* severed, and singly appealed. In the Circuit Court, *Goodhue* set up as a defense that *Palmer* had given time to *Barker*, the principal in the note, without the consent of the surety. But the time was given upon a void, usurious contract, and, hence, did not operate to discharge the surety. *Shaw v. Binkard*, 10 Ind. R. 227.

On the trial, *Goodhue* offered *Barker* as a witness to prove payments on the note, and the amount of usurious interest that might be thus applied under § 4, 1 R. S. p. 344. The Court refused to hear the witness.

The matter to be proved by the witness was material and legitimate. Payments made by either of the joint makers of a note inure to the benefit of both; and we can see no legal reason or policy in excepting usurious interest, which, by the section of the statute cited, operates as payment *pro tanto*, from the rule.

The witness offered was competent to make the proof. The objection to him was that he was a party to the suit. The objection was not true in point of fact. It is true that, at common law, all the defendants to a joint action must be brought into Court before judgment is taken against any. Hence all are parties to the suit in all its

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PIERCE
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stages. *Barton v. Petit*, 7 Cranch, 194.—*Davis v. Graniss*, 5 Blackf. 79, and note. 'But our statute has changed this rule, and judgment may be taken against a part of the joint defendants. And by 2 R. S. p. 461, § 64, it is expressly enacted that "when there are two or more plaintiffs or defendants, one or more of such plaintiffs or defendants may appeal without joining the others in such appeal."

In this case, *Barker* not having appealed from the judgment of the justice, that judgment stood operative and in force against him. He was no party to the suit upon the appeal, and had no interest in its result. He was, therefore, a competent witness. See *Kincaid v. Purcell*, 1 Ind. R. 324.—*Conwell v. Smith*, 4 *id.* 359.—*Wood v. Cohen*, 6 *id.* 455.—Ind. Dig., pp. 431, 432.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles, for the appellant.

J. A. Thornton, J. Orr, and J. Bradley, for the appellee.

PIERCE and Another v. SPADER and Another.

Thursday,
December 15.

APPEAL from the *Grant* Court of Common Pleas.

Per Curiam.—Suit upon a note reading thus:

"Due *Spader and Sutherland*, one hundred and eighteen dollars, and fifty cents, for shanties on the *M. and M. V. R. Road*, to be paid in good judgments on good men without relief from valuation or appraisement laws.

"*Marion*, April 16, 1855.

H. Pierce & Co.,

"per *W. B. C.*"

Answer, the general denial.

On the trial the defendants offered to prove the cash value of the judgments to guide the Court in the assessment of damages, but the Court refused to hear the proof, and gave judgment for the amount named in the note.

We think the note sued on is, in legal effect, precisely like that in *Parks v. Marshall*, 10 Ind. R. 20. There the note was to pay 400 dollars in the notes of a certain road—choses in action. Here the note is to pay 118 dollars, 50 cents, in good judgments. There is no condition made or election given. The sum is payable absolutely in judgments, evidently to be taken at their face, and their value was the true measure of damages in this suit. See, also, as in point, *Williams v. Jones*, 12 Ind. R. 561.

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THOMPSON
v.
RISTINE.

The judgment is reversed with costs. Cause remanded, &c.

J. Brownlee, for the appellants.

THOMPSON v. RISTINE, Administrator.

APPEAL from the *Fountain* Court of Common Pleas.

Thursday,
December 15.

Per Curiam.—*Thompson* filed a claim in the form of an itemized account, against the estate of *Thompson*. It appears to be for one half a certain warehouse, lot, and half the improvements thereon. No averments, or complaint, other than such claim, were filed.

The inference is, that the claim was in favor of a surviving partner or joint owner, against the estate of the deceased partner or joint owner; that being the fact, the claim does not amount to a succinct statement as required by the statute. It does not show sufficiently the character of the claim, or bill, as it is termed, nor that it had been paid by the surviving partner or joint owner.

For aught that appears, the estate will continue liable to the various persons named, as having furnished materials and labor for said building, although such claim should be paid to the plaintiff. The demurrer was properly sustained.

The judgment is affirmed with costs.

W. H. Mallory, for the appellant.

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VANCE v. COWING and Others.

VANCE
v.
COWING.

When a demurrer specifically points out the causes upon which the party relies, it cannot be enlarged to embrace other causes.

It is not necessary to obtain a judgment against an insolvent partner, before proceeding against equitable assets belonging to the estate of a deceased partner.

Where a party objects to a ruling of the Court, but does not follow up his objection by taking an exception to such ruling, the objection is waived.

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December 15.

APPEAL from the *Fayette* Circuit Court.

HANNA, J.—The appellees sued the appellant and others, and averred, in their complaint, that, in *June* and *September*, 1851, *Walter* and *Andrew J. Crawford* became indebted to them, in the sum of about 375 dollars; that *Andrew J.* was then, and continued, insolvent; that, in 1854, *Walter* died, without leaving any property subject to execution, and that there is no administration on his estate; that the debt of plaintiffs remains unpaid; that before the creation of said debt, said *Walter* had bought of one *Merrill*, and paid for, a lot of land, described; that, in *November*, 1850, the deed was, by the direction of said *Walter*, executed to *Vance*, “in consideration of said purchase by said *Crawford*, for the purpose and to the intent that said *Vance* should hold said lot in trust for, and on account of, said *Crawford*,” and to be beyond the reach of creditors; that, in 1852, *Crawford* put permanent improvements, to the value of 700 dollars, on said lot; that, in 1854, said *Walter* sold a part of said lot to one *Dickey*, for 2,050 dollars, and that the portion unsold is of the value of 600 dollars; that *Dickey* paid 1,050 dollars down, and gave two notes, of 500 dollars each, payable to said *Vance*, for the balance, and that the same are held in trust, &c.; that *Walter* left a widow and two children, &c.

Vance, *Dickey*, and the children of *Walter Crawford*, were made defendants; a judgment asked for the amount of the claim of plaintiffs, and that a decree should be rendered declaring *Vance* a trustee, and that *Dickey* pay into the clerk’s office, of the 1,000 dollars due for the purchase

of said lot, a sum sufficient to pay the amount that might be found due said plaintiffs. Nov. Term,
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The defendants, other than *Vance*, were defaulted, and a guardian, &c., appointed, who answered for the minors. VANCE
v.
COWING.

Vance demurred to the complaint for two causes—

First. For a defect of parties, because the widow of *Walter Crawford* was not made a defendant.

Second. That the facts stated were not sufficient, in this, that a judgment against *Andrew J.*, the surviving partner, is not alleged to have been taken.

The demurrer was, as to the first cause, sustained, and overruled as to the second.

The plaintiffs then made the widow a defendant.

Vance answered, first, a general denial; second, by special denials, and, also, setting up that *Walter* had purchased the lot in 1846, and paid 250 dollars; that becoming unable to pay for it, judgment was obtained against him in 1850, upon which *Vance* became replevin bail; that *Walter* being unable still to pay said judgment, offered defendant the lot if he would pay the judgment; that he, being the father-in-law of said *Walter*, and so bound for the debt, did pay it, and receive the deed therefor; that he, *Vance*, paid for the improvements made, and sold the part of said lot to *Dickey*, and held the balance thereof and said notes as his own, and not in trust for any one.

To this there was a reply filed, in denial.

Trial by the Court; finding and judgment, over a motion for a new trial, for the plaintiffs, &c.

It is now urged that there is a want of proper parties; that the administrator of *Walter Crawford* should have been made a defendant, and, if there was none, it is a fatal defect.

The demurrer filed did not make this, to-wit, the failure to make the administrator a party, an objection, nor was it raised by answer; it was, therefore, waived, even if it could have been successfully urged at any time. 2 R. S. p. 38. When a demurrer specifically points out the causes upon which the party relies, it cannot be enlarged to embrace other causes not brought to the consideration of the

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Court. *Robinson v. Leach*, 10 Ind. R. 308. The complaint shows that no administrator had been appointed, and, in effect, that the decedent had no personal effects to administer upon. *Welborn v. Jolly*, 4 Blackf. 279.—*Bryer v. Chase*, 8 id. 508.

The second cause of demurrer is confined specially to the non-recovery of a judgment against the surviving partner.

This was not necessary, because it was averred that he was, and continued to be, insolvent. The prosecution of a suit, and recovery of a judgment, against him, could, therefore, have only resulted in increasing, by the accumulation of costs, the amount ultimately to be paid.

A general bill of exceptions was taken, in which all the evidence is set forth; and in regard to various parts of such evidence, the bill shows that sometimes one, and at other times the other, party objected to the introduction of evidence; but no exception to the ruling upon the point was then noted; and in the conclusion of the bill, the defendant, *Vance*, excepted to the finding of the Court, and to the overruling the motion for a new trial.

The plaintiffs now urge that, as the record does not show that the defendant disclosed the grounds of objection, where objection was made, to the introduction of the evidence received, nor specially except thereto, that such objection cannot be noticed here.

We are of opinion that the exception to the admission of the evidence does not appear in the record. A party may object to the admission of evidence, and afterwards abandon that objection; if he does not, at the time, except to the ruling of the Court upon the point made by the objection, he, in effect, waives his objection.

It is argued that the judgment is not sustained by sufficient evidence, and is contrary to law.

We think the evidence so strongly tends to sustain the finding of the Court, in reference to a resulting trust in favor of *Walter Crawford*, arising out of the transaction, that we cannot, under our repeated decisions, disturb the finding and judgment upon that point.

It is insisted that as the conveyance to *Vance* was made previous to the time the *Crawfords* became indebted to plaintiffs, it cannot operate in fraud of their rights. The plaintiffs do not, if we understand their position, rest their case upon any charge of fraud, but upon the ground that *Vance* is but a trustee of the property, and that the resulting or equitable interest of *Walter Crawford* in the same ought to be subjected to the payment of the debts of said *Crawford*.

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The evidence tends to prove that *Vance* paid some 700 dollars on the land, and some amount on the improvements thereon, but how much is not at all made certain; and that 1,050 dollars was paid by *Dickey*, for the part by him purchased, to said *Vance*. If he was, as the Court found, holding said property in trust, subject to his claim, we do not see, from the evidence, but that the 1,050 dollars would fully pay all sums by him advanced; and, therefore, we cannot disturb the finding and judgment that the notes, &c., are held in trust for the heirs, &c., of said *Crawford*, and that it is consequently subject to his debts.

Per Curiam.—The judgment is affirmed with 3 per cent. damages and costs.

E. Vance and *B. F. Claypool*, for the appellant.

N. Trusler and *J. A. Fay*, for the appellees.

CORTNER and Others v. AMICK, Administrator.

The Court of Common Pleas has jurisdiction to appoint, in a proper case, a commissioner to make a deed in discharge of a title bond.

The estate, or heirs of the deceased obligor, in such bond, should be taxed with the costs necessarily incident to the making of such deed; but if they be increased by improper resistance on the part of any of the necessary parties to the suit, such party may be taxed with such increase of costs.

APPEAL from the *Clark* Court of Common Pleas.

HANNA, J.—*Cortner*, in his lifetime, sold to one *Causey*

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a certain tract of land, and executed his title bond for a deed; the bond was assigned by *Causey* to one *Passwater*, who executed his own notes, instead of those of *Causey*, to the administrator of *Cortner*.

The administrator brought this suit, making the heirs of *Cortner* defendants, alleging that they had failed to make a deed to *Passwater*, and that he, *Passwater*, was willing to pay the purchase-money upon the execution to him of a good title. One *Pangburn* was also made a defendant, on the ground that he fraudulently claimed some interest in said lands. *Passwater* was made a defendant, and a judgment prayed against him for the unpaid purchase-money.

The heirs of *Cortner* made no defense, but were defaulted.

Pangburn answered—

1. In denial.
2. Setting up title in himself to a portion of said lands by a deed executed by *Cortner* in his lifetime.

To the second paragraph of the answer, *Amick* replied:

1. In denial.
2. That said *Pangburn* had full notice at the time said land was conveyed to him, that *Causey* was in possession, and of his rights, &c., and afterwards represented to *Passwater*, before he purchased, that he, *Pangburn*, had no claim to any part of said lands.
3. That the deed of *Pangburn* was procured from *Cortner* by fraud, &c., setting out the act, &c.

Passwater filed an answer of five paragraphs. To the second, fourth, and fifth, demurrers were sustained and no exceptions taken, and, consequently, we cannot notice the points made on that ruling. The first was a general denial. The third avers that *Cortner*, at the time of his death, was not the owner of said land, nor are his heirs, &c.

Reply in denial to third paragraph.

Jury trial; verdict for the plaintiff, finding in his favor specially upon all the issues.

No notice is taken, in the judgment, of the issues found against *Pangburn*.

A conditional judgment was rendered appointing a commissioner to execute a deed of the interest of the heirs of *Cortner* to *Passwater*, if he, *Passwater*, should, in thirty days, pay into the clerk's office the amount of the purchase-money found due, &c., and if he did not, execution was directed to issue and said land to be sold, and the proceeds applied to the payment of said sum so found due; the balance, if any, to be paid to said *Passwater*; but if, upon said sale, enough was not realized to pay said judgment, the balance to be levied of any property of said *Passwater*.

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v.
AMICK.

Upon this, the first point made in the brief of counsel, is, that the Common Pleas Court had no jurisdiction, because the title to real estate was in issue. 2 R. S. p. 17 expressly confers jurisdiction, concurrently with the Circuit Court, upon the Common Pleas Court in applications for the appointment of a commissioner to make a deed on a title bond. Then, for that purpose, and as to all necessary parties to make a complete decree in that respect, the Court had jurisdiction.

But it is said that *Pangburn* was not a necessary party to that proceeding, and, therefore, the Court had no jurisdiction to determine as to the validity of his title. Without deciding that question, it is manifest that there is nothing in this record of which he can complain. There was no judgment against him from which he could appeal. The verdict of a jury, without a judgment, will not, under the circumstances, conclude his rights, if he has any.

The evidence is not in the record; and no exceptions having been taken to the rulings on demurrers; the question relied on by *Passwater*, namely, that no deed was tendered to him before suit brought, is not before us in any form to enable us to pass upon it.

It appears by a bill of exceptions, that after the evidence was closed, and as the Court commenced instructing the jury, the defendants requested that the instructions should be in writing. The Court refused, for the reason that the request was not made in time. There was no error in this. *McJunkins v. The State*, 10 Ind. R. 140.

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The last point made is, in relation to the costs. The Court gave judgment against *Passwater* for the whole of the costs. Under the circumstances, we think this was wrong. The estate, or heirs, of *Cortner* should be held liable for the costs which were necessarily incurred to procure the appointment of a commissioner and make a deed, &c. *Passwater* should be held for any part of the costs made by his resistance to the payment of the money.

Per Curiam.—The judgment is affirmed, except as to costs; the Court below is directed to modify it in accordance with this opinion, in regard to said costs. Costs in this Court to be paid by the administrator of the goods, &c., in his hands, &c.

J. S. Buchanan, for the appellants.

J. D. Ferguson, for the appellee.

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An illegal discharge, by the Court, of a jury in a civil case, does not work a discontinuance of such case.

A final adjournment of the Court, at the close of a term, operates to discharge a jury then in possession of a cause.

Thursday,
December 15.

APPEAL from the *Lagrange* Court of Common Pleas.

WORDEN, J.—Suit by appellee against appellant, to recover the value of certain wheat. Trial, and verdict for the plaintiff; motion in arrest overruled, and judgment.

The appellant assigns three errors; the first of which relates to the ruling of the Court on the admission of evidence. We shall not further notice it, as there was no motion for a new trial, and the motion in arrest affirms the verdict. *Anthony v. Lewis*, 8 Ind. R. 339.

The second and third errors assigned are, that the Court erred in impanneling a jury and trying the action by it, when a jury, formerly impaneled to try it, remained impaneled and undischarged, deliberating on their verdict;

and in refusing to arrest the judgment. These two assignments are predicated upon the same facts, and will be considered together.

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v.
EDGEBOOMB.

It appears by the record, and a bill of exceptions, that on *Thursday*, the fourth day of the *February* term of the Court, 1858, at about 8 o'clock in the evening, the cause was submitted to a jury, who retired to deliberate, with directions to seal up their verdict, and bring it into Court the next morning, at 9 o'clock. In the meantime, the Court stood adjourned until the next morning. On the next morning, before the calling of the Court, the judge of the Court discharged the jury without the consent of the defendant or his attorney, and in their absence, the jury representing to the judge that they were unable to agree upon a verdict. The cause stood continued until the next term, at which time the defendant objected to proceeding to the trial of the cause until the jury, impaneled at the last term, should be legally discharged; but the objection was overruled, and a jury impaneled, and the cause tried.

It is insisted that the judge of the Court, after the Court had adjourned in the evening, and before the sitting thereof in the morning, had no right whatever to discharge the jury. We need not determine whether the judge of a Court might not have the right, under such circumstances, to discharge a jury, as, admitting the discharge of the jury to have been unauthorized by law, and wrong, still, in our opinion, such discharge does not work a discontinuance of the cause, nor prevent the impanneling of another jury to try it. To take the strongest view of the question in favor of the appellant, and suppose the act of the judge, in discharging the jury, to have been wholly unauthorized and void, the case would stand as if the jury, of their own volition, had dispersed and not returned, having rendered no verdict. In such case it cannot be doubted but that the Court would have the right at the next term to impanel another jury, and proceed with the trial. Thus in *Harris v. Doe*, 4 Blackf. 369, a jury was impaneled, who, having heard a part of the testimony, was, by consent of parties, suffered to disperse, during an adjournment of the Court,

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over night. On the next morning one of the jurors failed to appear, whereupon the Court discharged the jury, and caused another to be immediately impaneled, and the trial to proceed. Held, no error. But in the case at bar, the jury were legally discharged when the Court adjourned for the term, if not by the order of the judge. A final adjournment of the Court for the term, operates as a legal discharge of a jury, and terminates their functions as such. The jury having been legally discharged, by the adjournment of the Court, if not by the order of the judge, without having rendered a verdict, it was entirely regular at the next term to impanel a jury, and proceed with the trial.

The motion in arrest of judgment, being predicated upon the same facts, needs no further discussion.

Per Curiam.—The judgment is affirmed with costs.

A. Ellison, for the appellant

J. M. Flagg, for the appellee.

HENSICKER and Wife v. LAMBORN and Wife.

A mortgagee may recover a judgment for his debt, and yet, under our statute, if he does not take out an execution, he may proceed to foreclose his mortgage.

Thursday,
December 15.

APPEAL from the *Fountain* Court of Common Pleas.

WORDEN, J.—Complaint by the appellees against the appellants for the foreclosure of a mortgage. It is alleged in the complaint that the plaintiffs “obtained judgment at the *January* term, 1857, of said Court of Common Pleas, for the amount due upon the note secured by the aforesaid mortgage; but that no payment or satisfaction has been made of the same, and no execution has issued thereon.”

Demurrer to the complaint overruled, and judgment of foreclosure entered.

The only question raised in the case is, whether a mort-

gagee, having recovered a judgment upon the debt secured by mortgage, and having taken out no execution upon his judgment, the same remaining unsatisfied, can proceed to foreclose his mortgage.

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At common law, a mortgagee might prosecute concurrently or separately, an action of ejectment to recover possession of the land; an action at law to recover the debt; and a bill in chancery to foreclose the mortgage. *Vide* Perk. Pr. 645.

Our statutes have changed the law materially in this respect. Thus, by § 1. 2 R. S. p. 239, it is enacted that unless a mortgage specially provide that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same. By § 636, p. 176, it is provided that "the plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter, while he is foreclosing his mortgage, or prosecuting a judgment of foreclosure."

The letter of the foregoing section did not prevent the plaintiff, in the case at bar, from proceeding with his foreclosure, as he was not "prosecuting any other action," having already obtained his judgment, nor was he "seeking to obtain execution," having declined to take out execution. Keeping in view the principles of the common law, in respect to the remedies of a mortgagee, we are of opinion that the statute should not, by construction, be extended further than its terms import. Hence, it follows that a mortgagee having recovered a judgment for his debt, yet if he have taken out no execution, he may proceed to foreclose his mortgage. He cannot levy upon the mortgaged premises (§ 640), and the issuing of an execution might be entirely fruitless. There is nothing in the statute, or the principles of the common law, that would require him to have an execution issued and returned unsatisfied, before he can foreclose his mortgage.

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KIRBY
v.
ROBBINS.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. Ristine, for the appellants.

W. H. Mallory, for the appellees.

CARSON v. ALLEN.

Thursday,
December 15.

APPEAL from the *Shelby* Court of Common Pleas.

Per Curiam.—This case presents no question other than the correctness of the finding on the evidence. A bill of exceptions sets out evidence, but contains no statement, as required by rule 30, that "this was all the evidence given in the cause."

The judgment is affirmed with costs.

J. Harrison, for the appellant.

KIRBY v. ROBBINS, Assignee.

Thursday,
December 15.

APPEAL from the *Decatur* Court of Common Pleas.

Per Curiam.—In this case, there was a judgment by default against the appellant, who was the defendant, in the Common Pleas. But the record fails to show that, prior to the taking of the appeal, there was a motion in that Court to set aside the default. Hence, the cause is not properly before us.

We have repeatedly decided that "where a judgment is taken by default, a motion to set aside the default must precede an appeal to this Court." *Blair v. Davis*, 9 Ind. R. 236.—*Harlan v. Edwards*, and other cases, at the present term (1).

The appeal is dismissed with costs.
J. Gavin and *O. B. Hord*, for the appellant.
J. L. Ketcham and *I. Coffin*, for the appellee.

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BUCHANAN
 v.
 BEARD.

(1) *Ante*, 430.

DOUGLAS v. THE MICHIGAN ROAD COMPANY.

APPEAL from the *Clinton* Court of Common Pleas.

Thursday,
 December 15.

Per Curiam.—In this case, there are no errors assigned upon the record. The cause is, therefore, not properly before us. The appeal must be dismissed.

The appeal is dismissed with costs.

BUCHANAN v. BEARD and Another.

APPEAL from the *Howard* Court of Common Pleas.

Thursday,
 December 15.

Per Curiam.—Action to foreclose a mortgage. The appellees were the plaintiffs below, and the appellant was the defendant.

The record shows that on the seventh day of the *April* term of said Court, and before the defendant had appeared to the action, *Murrey* and *Robinson*, attorneys of the Court, as friends of the Court, moved to dismiss the action for the want of a sufficient service of process; but the Court overruled the motion, and the said attorneys excepted.

The exception thus taken is not available in this Court, because we have repeatedly decided that an attorney, as *amicus curiæ*, has no right, in that character, to except to the rulings of the Court. *Hust v. Conn*, 12 Ind. R. 257,

Nov. Term, 1859. and cases there cited. See, also, *Coombs v. The New Albany, &c., Railroad Co.*, at the present term (1).

MURDOCK v. WHEELOCK. As this is the only point made by the appellant in his brief, the judgment must be affirmed.

The judgment is affirmed with 10 per cent. damages and costs.

C. D. Murray and *J. W. Robinson*, for the appellant.

(1) *Post*.

MURDOCK v. WHEELOCK and Another.

Prior to the act of 1859, the Common Pleas had not jurisdiction, except in certain special cases, where the amount involved was 1,000 dollars, or upwards.

Friday,
December 16.

APPEAL from the *Cass* Court of Common Pleas.

DAVISON, J.—The appellees, who were the plaintiffs, brought an action against *Charles B. Knowlton* and *Andrew J. Murdock*, in said Court, upon their assignments of three several promissory notes. The notes were executed by one *Thomas W. Stevenson*, payable to the said *Knowlton*, who assigned them to *Murdock*, who assigned them to the plaintiffs.

The complaint avers that the plaintiffs, on the 12th of *November*, 1855, recovered a judgment upon the notes, in said Court, against *Stevenson*, for 884 dollars, 59 cents, and costs, &c.; upon which an execution was issued, and by the sheriff duly returned, “no property found whereon to levy.” It is averred that the judgment so recovered is wholly unpaid; that at the time the notes became due, the rate of exchange on *New York* was, and still is, 5 dollars on each 100 dollars, which they, the plaintiffs, claim of the defendants; and that for charges of protest upon the several notes, and for costs and charges expended in and about

the recovery of said judgment, they have paid 100 dollars, which they demand of the defendants. The complaint concludes thus: "Wherefore the plaintiffs demand judgment against the defendants for the sum of 1,000 dollars, to be collected without relief," &c.

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MURDOCK
v.
WHEELLOCK.

The cause was submitted to the Court, who found for the plaintiffs 958 dollars, 15 cents; and, having refused a new trial, rendered judgment, &c.

The point mainly relied on for the reversal of this judgment, is, that the sum demanded by the complaint is an amount to which the jurisdiction of the Common Pleas does not extend.

An "act to establish Courts of Common Pleas," &c., approved *May* 14, 1852, declares that, "In all civil actions, except for slander, libel, breach of marriage contract, action on official bond of any state or county officer, and where the title to real estate shall be in issue, the Court of Common Pleas shall have concurrent jurisdiction with the Circuit Court, when the sum due or demanded, or the damages claimed, shall not exceed 1,000 dollars, exclusive of interest and cost." 2 R. S. p. 18, § 11.

It must be conceded that this section, as it stands, allows the jurisdiction assumed in the case before us. But, subsequently, on the first of *June*, 1852, an act, relative to the organization of Circuit Courts, was passed, whereby it was provided that that Court "shall have original, exclusive jurisdiction where the amount involved is 1,000 dollars or upwards." *Id.*, p. 6, § 5.

We have decided that "this provision of the latter act, being utterly repugnant to the provision of the Common Pleas act, giving that Court jurisdiction in cases where the amount was 1,000 dollars, repealed said provision of the Common Pleas act." *Fisher v. Prewitt*, 7 Ind. R. 519.

In that case, it was directly held "that the Courts of Common Pleas have no jurisdiction where the amount involved is 1,000 dollars or upwards." What, then, is the amount involved in the case at bar? The plaintiffs, in their complaint, claim 884 dollars, the amount of the judg-

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ment against *Stevenson*; also 5 per cent. on that judgment, the rate of exchange on *New York*, which would be 44 dollars; and, in addition, 100 dollars, paid out for cost and charges in and about the recovery of said judgment; making an aggregate amount of 1,028 dollars. This, at once, shows that the Common Pleas could not, rightfully, take cognizance of the case before it.

But we are referred to *Collins v. Shaw*, 8 Ind. R. 516. There the sum demanded was 1,000 dollars. A copy of the note sued on was filed with, and made a part of, the complaint. It was for 1,911 dollars; but credits were entered upon it, which reduced the amount below 1,000 dollars. In view of these facts, the Court held, as in *Fisher v. Prewitt, supra*, "that where the amount involved is 1,000 dollars or upwards, the Common Pleas has no jurisdiction." But that, in the case then under consideration, the note, with its credits, being a part of the complaint, showed that the plaintiff could not recover as much as 1,000 dollars, and the damages claimed in the conclusion did not enlarge the claim.

Thus, it will be seen, that *Collins v. Shaw* is not an authority in point; because here the sum demanded in the conclusion of the complaint, as also the amount involved in the action, is beyond the jurisdiction of the Common Pleas.

It may be noted that since the above cause was submitted in this Court, § 11 of the Common Pleas act has been amended. See Acts of 1859, p. 93, § 1.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Chamberlin, for the appellant.

H. P. Biddle and *B. W. Peters*, for the appellees.

KELLENBERGER v. FORESMAN.

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KELLEN-
BERGER
v.
FORESMAN.

A written instrument acknowledging an amount of money to be due on settlement of accounts, but subject, on a contingency, to a deduction, draws interest, under our statute, upon the amount remaining after the deduction has been made.

As a general rule of law, the landlord is not bound to repair without a special agreement, but the tenant is.

While either party is, legally, and with reasonable diligence, making repairs, the rent still runs against the tenant.

APPEAL from the *Tippecanoe* Circuit Court.

Friday,
December 16.

PERKINS, J.—Suit by *Foresman* against *Kellenberger*.

The complaint contains five paragraphs.

The first is upon a written lease of a mill at 800 dollars per year. *Kellenberger* agrees to take good care of the mill and dam, and to keep them in repair, and to clean out the races and keep them clean, except that if he cleaned the races out once in the year well, he was not to be compelled to clean them a second time just before the expiration of his year.

The second paragraph is upon a written instrument, dated *May* 1, 1854, which commences thus: "This day settled all our accounts in full unto this date, and there remained due from *George Kellenberger* to *George Foresman* 426 dollars, 23 cents. Probably there is some bad debts standing out in the above money. If any should be lost in collecting them, the said *Foresman* is to bear his part of the loss, that is, two-thirds of it."

The third paragraph is for use and occupation.

The fourth is for damages for breach of the agreement to keep the mill in order.

The fifth is in the nature of the common counts in the former system of pleading.

The defendant answered by the general denial, and in paragraphs setting up a set-off, and a counterclaim.

Issues of fact were formed and tried, and the plaintiff had judgment.

The Court instructed the jury that the plaintiff was en-

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v.
FORESMAN.

titled to interest upon the face of the above-written memorandum of settlement, which was signed by both parties, except so far as the defendant showed that it included bad debts. We think this instruction was correct.

The statute enacts that there shall be interest "on money due on any instrument in writing, or on settlement of account." 1 R. S. p. 343.

In this case, the money is admitted to be due by a written instrument, and upon the settlement of accounts. The instrument provides for a deduction to the amount that the consideration may fail, and on that amount there should be no interest.

2. The Court permitted proof of the condition of the races at the time of the expiration of the lease. There could be no objection to this; but whether that condition would subject the lessee to damages, would be determined by the stipulations in the lease, and the fact as to whether he had cleaned them well once before within the year, and, perhaps, the length of time before its expiration.

3. The defendant offered to prove that the wheel of the mill "was so rotten that it could not be repaired except by a new wheel, and that, before the expiration of the lease, the plaintiff took possession of the mill and made a new wheel, and so occupied the mill in making and putting up said wheel that the defendant could not use said mill for one month before the expiration of said lease." The Court refused the evidence.

We do not see what good the evidence could have done the defendant. It would seem that the plaintiff might well have desired to offer it as a ground of claim upon the defendant.

As a general proposition of law, the landlord is not bound to repair without a special agreement, while it is the duty of the tenant to keep the premises in repair. Taylor's Land. and Ten. 208.—*Moffat v. Smith*, 4 Comst. (N. Y.) 126.

There was no special agreement to keep the mill in repair, on the part of the landlord, in this case. But if there had been, he would have been entitled to such possession

of the mill as would enable him to make the repairs, and the tenant would not have been entitled to a deduction of rent therefor. So, the tenant, while himself making the repairs, which he was legally liable to make, would not be entitled to a deduction of rent for the time consumed in making the repairs. We do not see how the tenant was injured by the making of repairs by his landlord, without which, as appears by the record, the mill could not have been operated. See, as to eviction of tenant by landlord, and the consequent suspension of rent, *Gilhooley v. Washington*, 4 Comst. (N. Y.) 217; *Giles v. Comstock*, *id.* 270; and *Taylor's Land. and Ten.*, p. 247.

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CARLISLE
v.
THE EVANS-
VILLE, &C.,
RAILROAD Co.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. M. La Rue, for the appellant.

W. C. Wilson and *G. Gardner*, for the appellee.

CARLISLE v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

APPEAL from the *Marion* Circuit Court.

Friday,
December 16.

Per Curiam.—The defense, attempted to be set up, was, that the note was given on a stock subscription, and that certain verbal representations were made by the agents of the company preceding said subscription.

This question has been settled. *Eakright v. The Logansport, &c., Railroad Co.*, and authorities there cited, at this term (1).

The judgment is affirmed with costs.

L. Barbour and *J. D. Howland*, for the appellant.

O. H. Smith, for the appellees.

(1) *Ante*, 404.

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RODMAN and Others *v.* KELLY.

DRULEY
v.
HENDRICKS.

Friday,
December 16.

APPEAL from the *Boone* Circuit Court.

Per Curiam.—This case is similar to one between the same parties at this term (1).

The judgment is affirmed with costs.

A. J. Boone, for the appellants.

T. J. Cason, for the appellee.

(1) *Ante*, 377.

DRULEY *v.* HENDRICKS.

Friday,
December 16.

APPEAL from the *Union* Court of Common Pleas.

Per Curiam.—Suit on a note. Judgment for plaintiff. Defendant appeals.

The only question in the case arises upon the ruling of the Court, in setting aside certain interrogatories filed by the defendant. The interrogatories were properly set aside, not being relevant to the matter in controversy. The answer was, that the note was given without consideration. The interrogatories sought to elicit proof that the note was given, not without consideration, but in consideration of a horse sold and delivered by the plaintiff to another joint maker of the note, before the making thereof.

The judgment is affirmed with 5 per cent. damages and costs.

J. F. Gardner, for the appellant.

J. Yaryan and ——— *Bennett*, for the appellee.

NUTTER v. THE JUNCTION RAILROAD COMPANY.

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THE JUNC-
TION RAIL-
ROAD Co.

The appellee must assign cross errors if he seeks to have them noticed in the appellate Court.

Where a verdict of a jury rests in calculation, and they find excessive damages, a new trial may be granted, if asked for, for such cause, and no remittitur is offered.

APPEAL from the *Fayette* Circuit Court.

Friday,
December 16.

HANNA, J.—*Nutter*, as assignee of *Cully*, sued the defendants.

The first paragraph is on an account; the second, on an account stated.

The account was made up of goods, moneys, &c., furnished to laborers, &c., on the second division of the road of defendants.

The defendants demurred, but we cannot pass upon that demurrer, nor upon the rulings of the Court in reference to various questions raised by the defendants during the progress of the trial, for the reason that no cross errors are assigned.

The defendants answered in three paragraphs—

1. A denial.

2. Set-off.

3. That the indebtedness accrued to *Cully* and *Nutter*, as partners, and not to *Cully* individually.

Reply in denial.

Trial by jury, verdict and judgment for plaintiff for 500 dollars, over a motion by plaintiff for a new trial.

It appears from the evidence that the defendants, previous to the first of *February*, 1854, had a contract with *Higdon* and *Chambers*, for the construction of the second division of said road; about that date, in consequence of the dissatisfaction of laborers and others, an arrangement was made by which the company, through agents, was to pay the laborers and others for work thereafter done, and materials, &c., furnished; but whether the contractors surrendered, and the company assumed absolute control, is, by the evidence, a controverted point. *Cully*, who was intro-

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THE JUNC-
TION RAIL-
ROAD CO.

duced as a witness, testified that *Woods*, the president and acting superintendant of the road, agreed that the defendants should pay, and that the defendants did pay, him 2,900 dollars, due said *Cully* from said contractors on the first of *February*, 1854. To this point, much of the voluminous testimony is directed.

We are not able to perceive how the jury, under the evidence, could find for the plaintiff the sum which was found. If anything should have been found, a point we do not express any opinion about, in view of the fact that another trial must be had, it was certainly a much larger sum than that named in the verdict, even if the debt of *Higdon* and *Chambers* accrued previous to *February* 1, should have been excluded. Whether that should be included or not in the charge against the company, is a question of fact proper for the jury hereafter to pass upon.

The claim of *Cully* accrued subsequent to *February* 1, is 9,404 dollars, which he swears to, and concerning which the directors, agents, and attorneys of the company, who were introduced by the defendants as witnesses, indirectly admit there was no controversy, by their testimony, to the effect that, in attempts to arrange the whole accounts, the matter in controversy was the fact whether the company were to pay the debt of *Higdon & Co.* to *Cully* prior to *February* 1, 1854.

The payments, according to the evidence of *Cully*, were about 7,000 dollars. *Chambers*, another witness, makes the amount less than that; and *Leach*, the secretary of the company, states the credits within his knowledge at a still greatly less sum.

After the first of *February*, it appears from the evidence that neither *Higdon* nor *Chambers*, the contractors, gave the work their personal attention; but that one *Byrom* received and paid out the money due on estimates, as the agent of the contractors and the company, as he states; and one *Chambers* kept, in the name of the said contractors, the accounts and books in regard to work done, materials, &c., furnished, and payments made. Whether he acted as a clerk and agent of the company, or in that ca-

capacity for the contractors, is a disputed question. He states that he was employed by, and acted for, the company. Members of the board, &c., state that he was not in the employ of the company; but that the company paid him as any other person in the employ of the contractors was paid.

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V.
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ALO AND
MISSISSIPPI
RAILROAD Co.

One paragraph of the complaint was based upon a balance of account struck by this witness and *Cully*, a statement or certificate of which he gave in writing, at the close of the business in *August*, 1854, which showed 6,178 dollars, 30 cents due *Cully* at that time. We have not been able to see that errors in this statement, at the time it was made, or payments afterwards made, were proved to an amount sufficient to reduce it near so low as the sum for which the verdict was returned, even if it was at all taken as a basis for any of the calculations made by the jury.

This case, we think, falls clearly within the rule in reference to those in which we will revise the finding on questions of fact.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Reid and *S. Heron*, for the appellants.

S. W. Parker and *J. C. McIntosh*, for the appellees.

FORRESTER v. THE BUFFALO AND MISSISSIPPI RAILROAD
COMPANY.

APPEAL from the *Laporte* Circuit Court.

Friday,
December 16.

Per Curiam.—This was a proceeding instituted in *July*, 1851, before a justice of the peace, by said railroad company, under their charter, to condemn the right of way for one mile, through the land of the appellant, who was the defendant. See Local Acts, 1835, p. 16, § 17. The justice gave judgment for the company, and the defendant prosecuted a writ of *certiorari*, whereby the proceedings

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and judgment before the justice were removed to the *La-porte* Circuit Court. See R. S. 1843, p. 893.

A bill of exceptions taken by the defendant, shows that, upon the calling of the cause in the Circuit Court, the company moved to dismiss the *certiorari*, and that the Court sustained the motion. But the ground upon which the motion was sustained is not shown. Hence, the action of the Court, upon the motion, cannot be assigned for error in this Court, and the judgment must, therefore, be affirmed.

The judgment is affirmed with costs.

A. L. Osborn, for the appellant.

FORST v. ELSTON and Another.

Repugnancy of allegations is not a ground of demurrer under the code.

Quære, whether it can be proved by parol that a place at which a note is payable, is a bank, though not so described in the note.

Friday,
December 16.

APPEAL from the *Montgomery* Court of Common Pleas.

PERKINS, J.—Action upon a promissory note payable at the office of *Elston* and *Lane*. The complaint avers that the office of *Elston* and *Lane* was a private banking office of discount and deposit, and known to be so by the makers of the note and the public generally.

The defendants demurred to the complaint, the demurrer was overruled, the defendants refused to answer over, and judgment was rendered against them for the amount of the note.

They appeal to this Court, and contend that the demurrer should have been sustained, on the ground that the note does not express that the office of *Elston* and *Lane* is a bank; that an office is not a bank; that it cannot be shown by parol evidence to be a bank; and, hence, that the averment in the complaint, that said office is a bank,

is repugnant to the legal effect of the instrument sued on, and, for that reason, bad. Nov. Term.
1859.

Admit all this to be true, still the objection could not be reached by a demurrer to the complaint, because repugnancy of allegations is not a cause of demurrer; and without the allegation objected to in this case, the complaint contained facts sufficient to constitute a good cause of action. WATERS
v.
SALTMARSH.

The defendant might have raised the question of repugnancy by a motion to strike out the allegation objected to, and saved the objection by exception. Having done so, if it turned out on the trial that the question presented was material, it could be examined on appeal. It could become material only in the event that a set-off or failure of consideration or the like, should be set up in defense against the payee, where the suit was by an indorsee. See *Davis v. McAlpine*, 10 Ind. R. 137.

From what has been said, it will be manifest that it is not necessary to decide in this case, whether an office named in a note can be shown by parol to be a bank or not, and we do not decide the point.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

I. Naylor, for the appellant.

S. C. Willson and *J. E. McDonald*, for the appellees.

WATERS v. SALTMARSH.

APPEAL from the *Dearborn* Court of Common Pleas. Friday,
December 16.

Per Curiam.—Action by *Saltmarsh* against *Waters*, to recover the value of thirty ounces of gold dust, deposited by the plaintiff with the defendant, in *California*, in the year 1850.

Answer in denial; also, the statutes of limitations of *California*, and of this state.

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GILBRETH
v.
GREWELL.

Replication; trial; verdict and judgment for the plaintiff, over a motion for a new trial.

Several errors are assigned, relating to the charges given and refused, and the ruling of the Court on the motion for a new trial.

A bill of exceptions was filed, which set out the evidence offered in the cause; but it does not, in compliance with rule 30, state that "this was all the evidence given in the cause." This statement, in the language of the rule, is "technical and indispensable to repel the presumption of other evidence." *Vide Beard v. The First Presbyterian Church of Peru*, 10 Ind. R. 568.

In this particular case, it is apparent, from the bill of exceptions itself, that there was evidence not contained in it, as it states that "the defendant offered in evidence the statute of limitations in the revised statutes of *California* for the years 1850 and 1853." No such statutes are set out, or in any manner contained, in the bill of exceptions.

The evidence not being before us, we must presume that the charges refused, if abstractly correct, were not applicable to the case made by the evidence. We do not perceive that the charges given are erroneous, as applied to any case that might have been made by the evidence under the issues.

For the same reason, we must presume that the motion for a new trial was correctly overruled.

The judgment is affirmed with 5 per cent. damages and costs.

S. S. Harding, for the appellant.

P. L. Spooner, for the appellee.

GILBRETH v. GREWELL.

Where a contract of sale of land provided "that if default should be made in fulfilling any part of the contract on the part of the purchaser, the seller

might regard the contract as forfeited, and re-sell the land ;" it was *held*, that the forfeiture of the contract did not exempt the seller, if he enforced the forfeiture, from accounting to the purchaser for payments made, over and above damages accruing from the breach of the agreement, to the seller.

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GILBRETH
v.
GREWELL.

APPEAL from the *Grant* Circuit Court.

WORDEN, J.—This was an action brought by the appellee against the appellant, to recover, amongst other things, money paid by the plaintiff to the defendant on a contract for the sale of land. It appears, that in *August*, 1855, the plaintiff and defendant entered into a written agreement, by which the defendant agreed to sell to the plaintiff certain land therein described, for a price therein stipulated, 217 dollars of which was paid down, the remaining portion to be paid thereafter; and it was stipulated in the agreement, "that if default should be made in fulfilling the agreement, or any part thereof, on the part of *Grewell*, then, and in such case, *Gilbreth* should be at liberty to consider the contract as forfeited and annulled, and to dispose of the land to any other person in the same manner as if the contract had never been made." The plaintiff took possession of the land, and occupied it about a year, when, an installment of the purchase-money being due and unpaid, the defendant took possession, and notified the plaintiff not to put in or sow wheat, for if he did, the defendant would reap it.

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The complaint sets up some other matters, and claims some other relief than the recovery of the money thus paid, but we deem it unnecessary to further notice it. Trial by a jury, verdict and judgment for the plaintiff; motions for a new trial, and in arrest of judgment, being overruled.

The appellant makes two points in his brief for the reversal of the judgment.

First. That the judgment should have been arrested; and,

Second. That a new trial should have been granted on the merits.

It is insisted, as a reason for the arrest of judgment, that there is a misjoinder of matters of tort and of contract in the complaint. If this be true, in point of fact, even had

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GREWELL.

the complaint been demurred to on this ground, and the demurrer improperly overruled, we could not reverse the judgment. Section 52 of the code provides that "no judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for a misjoinder of causes of action."

In reference to the second point, it is insisted that the contract should be construed to mean that, upon default in the performance of the contract by *Grewell*, the 217 dollars paid by him thereon, should be forfeited, or deemed as liquidated damages. We do not, however, think the contract will bear such interpretation. The contract would probably hold *Grewell* to a strict performance in point of time, or in default, give *Gilbreth* the option to consider it rescinded; but we do not think it gives *Gilbreth*, upon a failure by *Grewell* to pay an installment on the day when it became due, the right to rescind the contract and keep not only the land, but all that had been paid on it.

From the evidence in the case it is apparent that, upon the failure of *Grewell* to pay the installment that was due, *Gilbreth* treated the contract as rescinded. In such case he would be liable to *Grewell* for whatever he had paid on the contract, subject, perhaps, to the damages, if any, which he may have sustained by *Grewell's* non-performance.

It is thoroughly settled in *Indiana* that, where one party to an entire special contract has not complied with its terms, but professing to act under it, has done for, or delivered to, the other party, something of value to him, which he has accepted, the party who has been thus benefited by the labor or property of another, shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him. *Wheatly v. Miscall*, 5 Ind. R. 142, and cases there cited. *Vide*, also, *Wolcott v. Yeager*, 11 Ind. R. 84.

We see no error in the record for which the judgment should be reversed.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. Brownlee and *H. S. Kelley*, for the appellant.

A. Steele, *H. D. Thompson*, and *M. L. Marsh*, for the appellee.

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GILES
v.
GULLION.

GILES. v. GULLION.

Where a demurrer is sustained to an answer, the Court, if the defendant does not ask leave to amend, may proceed to judgment for the plaintiff.

The case of *Strong v. Clem*, 12 Ind. R. 37, affirmed.

APPEAL from the *Howard* Court of Common Pleas.

Friday,
December 16.

WORDEN, J.—Suit by *Gullion* against *Giles*, on a promissory note for 150 dollars, made by *Giles* to one *Reeder*, and by *Reeder* indorsed to the plaintiff.

Answer that the note was given for a part of the purchase-money for certain real estate purchased by the defendant from one *George Sargaser*, who had purchased the same from *Reeder*; that at the time of the purchase from *Sargaser*, he was still indebted to *Reeder*, his vendor, for the purchase-money for said land, and the defendant assumed *Sargaser's* indebtedness to *Reeder*, and gave his own notes, one of which is the foundation of this suit, there being another note given as above for 50 dollars, to fall due hereafter; that at the time of *Sargaser's* purchase from *Reeder*, *Reeder* and wife (she then being under twenty-one years of age, and her father, who was living at the time, not consenting to said conveyance in manner and form as contemplated by law,) joined and conveyed said land to *Sargaser*, but said wife, being a minor, neither did nor could release her right of dower in the premises; that *Sargaser* and wife conveyed the premises to defendant for 1,200 dollars, all of which has been paid except the two notes above mentioned; that at the time of de-

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GILES
v.
GULLIOW.

defendant's purchase, Mrs. *Reeder* had a contingent right of dower in the premises, of which the defendant, at the time, was entirely ignorant; that Mrs. *Reeder* has since arrived at majority, and the defendant has purchased in from her and extinguished her right of dower in the premises, at and for the sum of 100 dollars, paid to her by defendant, and that she has released to him all her right and title in the premises; wherefore, the consideration of the note has failed to the extent of 100 dollars, &c.

A demurrer was sustained to this answer; and on the defendant's failing and refusing to make further answer, final judgment was rendered for the plaintiff for the amount of the note and interest.

Two points are made by counsel for the appellant—

1. That the Court erred in sustaining the demurrer to the answer.

2. That the Court erred in rendering judgment against the defendant below, on sustaining the demurrer, without the defendant, by rule, being required to plead over.

Without stopping to inquire whether the answer would be otherwise valid, there is one point that is fatal to it. The note sued on bears date in *January*, 1852. The conveyances mentioned must have been executed at or before that time. There is no allegation of *Reeder's* death, and, for aught that appears, he is still living. It has already been determined that, in estates aliened by the husband previously to the taking effect of the revised code of 1852 (*May* 6, 1853), a married woman has no right of dower, or other interest, in the land, unless the right was made consummate by the death of the husband before the taking effect of the code. *Vide Strong v. Clem*, 12 Ind. R. 37.

Thus it appears that Mrs. *Reeder* had no dower or other interest in the land which could have been an incumbrance, and, consequently, there was nothing for the defendant to purchase in, in order to make his title perfect.

The demurrer was correctly sustained.

We are of opinion that the second point is not well taken. We are referred to § 382 of the code. That provides that "the judgment upon overruling a demurrer,

shall be that the party shall plead over," &c. This provision has no application to the case before us, because here the demurrer was sustained, not overruled. We think that upon a demurrer to an answer being sustained, if the defendant wish to amend, he should ask and obtain leave to do so; and if he fail and refuse to make such amendment, it is entirely correct to render final judgment against him, without any rule against him to make such amendment, or answer over, as was done in this case.

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THE CINCINNATI, &C.,
RAILROAD CO.
V.
CALVERT.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

N. R. Lindsay and *T. J. Harrison*, for the appellant.

J. Green, for the appellee.

MURPHY v. EVANS.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Friday, December 16.*

Per Curiam.—In this case, there is no brief filed, pointing out any supposed errors in the ruling of the Court below; wherefore, the judgment must be affirmed.

The judgment is affirmed with costs.

E. A. Greenlee and ——— *Mattler*, for the appellant.

R. C. Gregory, for the appellee.

THE CINCINNATI AND CHICAGO RAILROAD COMPANY v.
CALVERT.

APPEAL from the *Madison* Circuit Court.

Friday, December 16.

Per Curiam.—Suit by the appellee against the appellants, and judgment by default. The record recites that it was proven to the satisfaction of the Court, that process

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THE NEW
ALBANY, &C.,
RAILROAD CO.
v.
COMBS.

had been duly served on the defendants, but contains no copy of the summons or return. This was insufficient. *The New Albany, &c., Railroad Co. v. Welsh*, 9 Ind. R. 479. But no motion was made, or other steps taken, in the Court below, to set aside the judgment. This was necessary in order to entitle the appellants to bring the case to this Court. *Harlan v. Edwards*, at the present term (1).

The appeal is dismissed with costs.

W. Z. Stuart, for the appellants.

(1) *Ante*, 430.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
COMBS.

It seems that it is in the discretion of the Court to permit, or to refuse to permit, an attorney to withdraw his appearance in a cause.

A full appearance waives defects in process; but a limited one, for the purpose of making objections, does not.

Friday,
December 16.

APPEAL from the *Owen* Circuit Court.

WORDEN, J.—*Combs* sued the company before a justice of the peace, for killing stock, and had judgment by default. The company appealed to the Circuit Court, where the plaintiff also had judgment. The cause is brought here on a bill of exceptions only, under the provisions of § 347 of the code.

The bill shows that on the third day of the term, the company, by their attorney, as a friend to the Court, “moved to dismiss the cause for the want of sufficient return of service upon the defendants in the Court below; whereupon the plaintiff, by his attorney, moved the Court for a rule against the constable, to amend his return to the summons in this cause in the Court below, which motion of the plaintiff was sustained, and the said rule was entered; that before the constable’s return was amended, the

said defendants moved the Court to dismiss this cause for a misjoinder of causes of action; that before the conclusion of the argument, or the decision of the Court upon said motion, the defendants withdrew said motion, and moved the Court for leave to withdraw the appearance of said defendants to said cause, which motion was overruled," &c. The Court thereupon set aside the rule against the constable, on the ground that the appearance of the defendants waived all irregularities in the return of service, &c.

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THE NEW
ALBANY, &C.,
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V.
COMBS.

These rulings were duly excepted to.

There are but two errors assigned, which are as follows:

"The Court erred in dismissing the rule against the constable.

"The Court erred in ruling that the appearance cured all defects and irregularities."

It will be observed that the ruling of the Court in refusing to permit the defendants to withdraw their appearance, is not assigned for error, but had it been, it would probably have been unavailing, as this would seem to be a matter resting entirely in the discretion of the Court below.

The first motion made, viz., to dismiss the cause for the want of a sufficient return of service of process, was not passed upon by the Court. Had this motion been improperly overruled, the defendants could have availed themselves, by exception, of the error. An appearance for the purpose of such motion, does not require or involve an appearance to the action. In such case, a party may except in his character of a suitor, and not as *amicus curiæ*. *Hust v. Conn*, 12 Ind. R. 257, and cases there cited. While this motion was pending, awaiting such amendment as might be made to the return, the defendants moved to dismiss the cause for a misjoinder of causes of action. This motion could not be made without appearance to the action, and such appearance and motion waived all defects in the process. Ind. Dig. 126.

When an appearance was thus entered, the rule against the constable was of no consequence whatever, and there was no error committed in setting it aside.

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CHANDLER
v.
CHANDLER.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

W. G. Cooper, for the appellants.

W. M. Franklin, for the appellee.

CHANDLER v. CHANDLER.

A party for whom a judgment is rendered, may, *it seems*, in some cases, be taxed with the costs.

Alimony may be granted to the wife as incident to a judgment for a divorce in favor of the husband; but such an allowance will not be made, unasked.

The Court cannot, in a divorce case, appoint an attorney for an adult *compos mentis* party to a suit, against the consent of such party, and tax a fee for such attorney with costs.

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December 17.

APPEAL from the *Blackford* Circuit Court.

PERKINS, J.—Suit by *Janson Chandler*, against his wife, *Mary*, for a divorce.

Publication was duly made against the wife, as a non-resident.

When the cause was called, the plaintiff proved publication, and asked to have a default taken against the defendant, but it was not allowed.

He then asked leave to prove the allegations in his complaint; but it was refused.

The prosecuting attorney appeared to resist the divorce.

The Court, of its own motion, appointed *Walter March*, Esq., to assist him.

The cause was continued to a special term. At that term an answer was filed by the attorneys for the defendant, the cause was tried, the divorce was granted, says the record, to the plaintiff, but at his costs, and alimony, to the amount of 500 dollars, was ordered to be paid to the defendant, and a fee of 20 dollars to Mr. *March*. The defendant did not appear at the trial, did not wish to have the suit defended, and, by letter, disclaimed the appear-

ance of the counsel appointed by the Court as meddlesome interference. Nov. Term,
1859.

The husband was proved to be worth 1,600 dollars, and the alimony allowed, as we have seen, was 500 dollars. CHANDLER
V.
CHANDLER.

The only cause for a divorce, as shown by the record, was abandonment of the husband by the wife. Such is a sufficient statement of the facts.

According to the case of *Rourke v. Rourke*, 8 Ind. R. 427, the alimony allowed in this case was unreasonably large.

As to the costs, it seems that a judgment may, in some cases, be rendered in favor of a party on condition that he pays the costs. Perk. Pr. 367.

In *Stafford v. Stafford*, 9 Ind. R. 162, it is left undecided whether, under § 19, 2 R. S. p. 237, alimony can be decreed to the wife, as incident to a divorce granted to the husband, but the Court incline to the opinion that such a decree may be made, either under the statute, or, by virtue of the general equity powers of the Court.

But the question here presented is, whether the Court should make such allowance where it is neither asked nor desired; and we think it should not. Nor do we think it was in the power of the Court to thrust into the case an attorney for a party, against the wish of such party, being an adult, *compos mentis* person, and to tax a party with a compensation for his services.

The law has made provision that the prosecuting attorney shall appear and see that proceedings in certain divorce cases are conformable to law, where there is no appearance by the defendant; and has empowered the Court to make an allowance, in certain cases, to a party asking it, who does appear to aid in the conduct of the cause, by such party. See *Hart v. Hart*, 11 Ind. R. 384. And it is well that the Court is vigilant in these cases, in holding plaintiffs to the requirements of the statute.

But by what authority does the Court, in cases of adult persons legally notified of the pendency of suits, and who are capable of managing their own affairs, go beyond the law? Where is the warrant for such steps? Such a prac-

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ALLEN
v.
NOFSINGER.

tice would be liable to much abuse. Suppose, as in this case, an unasked allowance was made to a non-resident defendant who did not, and did not wish to, appear to the suit; and who might not, therefore, be informed of the allowance. Suppose it to be collected and received by an attorney appointed by the Court, whose authority the clerk and sheriff would, of course, respect, who would likely be benefited by the money.

In the case at bar, the character of counsel precludes the idea of misappropriation. It might not in all cases.

Per Curiam.—The judgment for alimony, and the allowance of 20 dollars to the attorney, are reversed. The judgment for a divorce is affirmed with costs.

J. Brownlee and *H. S. Kelley*, for the appellant.

W. March, for the appellee.

ALLEN and Another v. NOFSINGER.

A promissory note, and the contract in writing out of which it arises, if both are executed at the same time, constitute but one agreement; and that agreement cannot, as a general rule, be varied, or its terms added to, by parol evidence.

Saturday,
December 17.

APPEAL from the *Putnam* Circuit Court.

PERKINS, J.—In *January*, 1856, *Allen May* executed an agreement of which the following is a copy:

“Know all men by these presents, that I, *Allen May*, of the city of *Indianapolis*, county of *Marion*, state of *Indiana*, for value received, have bargained, sold, assigned, and transferred, and by these presents, do sell, bargain, assign, and transfer, unto *William D. Allen* and *John Sherill*, of the county of *Putnam*, *Indiana*, five hundred shares of the capital stock of the *Farmers' and Mechanics' Bank*, at *Indianapolis*, *Indiana*, standing in my name on the books of said bank; and I do hereby assign, transfer, and set over to the said *William D. Allen* and *John Sherill*, their order

or assigns, all rights and privileges, secured by virtue of the organization of said banking concern; and the safe and impressions belonging to said bank; also, all right, title, interest, claim, and demand, present, perspective, and reversionary in, and to any and all stocks and securities which have been by me, or any person or persons, transferred and deposited with the treasurer of state of the state of *Indiana*, for the redemption of the bills and notes of the said bank, in accordance with an act to authorize, &c., passed *March 3, 1855*. In witness whereof, &c.

"*January, 1856.*

Allen May, [seal.]"

At the same time, and as a part of the same transaction, a note, as follows, was executed:

"\$8,500.

Indianapolis, January 15, 1856.

"On or before the twenty-fifth day of *December* next, we promise to pay *H. E. Talbott*, the sum of eight thousand five hundred dollars, for value received, without the benefit of the valuation or appraisement law, the same to bear interest from date at the rate of six per cent.

[Signed]

"*W. D. Allen,*

"*John C. Sherill,*

"by *E. McCarty.*"

The note was made payable to *Talbott*, and was assigned to *Nofsinger* by direction of *May*.

Nofsinger sued upon the note and recovered below.

The defendants sought, on the trial, to prove that the written agreement above copied, did not embrace all of the stipulations of the sale upon which the note was given; that there was some resting in parol that had not been fulfilled. It was not pretended that there was any mistake, fraud, or fraudulent representations. The Circuit Court refused to hear evidence of such parol additions to the contract.

As the note and written agreement were executed at the same time, and upon the same transaction, they constitute one agreement, in effect, one instrument. Ind. Dig. 784.—*Cunningham v. Gwinn*, 4 Blackf. 341.

The case is as if the written agreement had been em-

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EVANS
v.
DOYLE.

Taken together, they purport to contain the complete contract of the parties. Such being the case, the law is well settled, that it cannot be varied, nor its terms added to, by parol evidence. The written contract must speak the terms of the agreement. Ind. Dig. 220, 439.—2 Phil. Ev., ed. 1859, p. 665.

Where a bill of sale of a slave contained a warranty of title, held, that a parol warranty of soundness, made at the same time, could not be proved. *Id.*, p. 667.

Exceptions to the above general rule exist, and the cases under them are cited in *Phillips, supra*, at p. 669; but the present case does not fall within them.

Per Curiam.—The judgment is affirmed with 3 per cent. damages and costs.

H. Secrest and *S. B. Gookins*, for the appellants.

J. P. Usher, for the appellee.

EVANS v. DOYLE.

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December 17.

APPEAL from the *Carroll* Court of Common Pleas.

Per Curiam.—There being no assignment of errors in this case, it is, therefore, dismissed.

The appeal is dismissed with costs.

A. H. Evans, *H. Allen*, and *B. F. Schermerhorn*, for the appellant.

DORON v. COSBY.

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1859.WAINSCOTT
v.
SILVERS.APPEAL from the *Shelby* Circuit Court.*Per Curiam*.—Suit on a note. Answer. Reply. Trial by the Court, judgment for plaintiff. *Saturday, December 17.*

"*Eliza L. Cosby*" complained on the note, and filed a copy thereof, in which the promise is to "*E. L. Cosby*." The answer did not put in issue the execution of the note.

Objection was made, on the trial, to the admission of the note as evidence, on account of variance, which raises the only point in the case. The evidence was properly admitted. *Grover v. Bruce*, 10 Ind. R. 418.

The judgment is affirmed, with 6 per cent. damages and costs.

M. M. Ray, for the appellant.

WAINSCOTT and Wife v. SILVERS.

If, on an executed sale of real estate, it be agreed by parol that the vendor shall retain the possession for a given time, he stands, while so occupying, so far as liability for the destruction or injury of the property is concerned, in the relation of a tenant to the vendee.

The tenant is not answerable, in the absence of an express agreement, for the destruction, by accidental fires, of buildings occupied.

In a judgment for the money due upon a mortgage, where it is payable in installments, and for the sale of the mortgaged property, it should appear that the Court made the inquiry whether the mortgaged land could be sold in parcels, before ordering the sale of the whole.

APPEAL from the *Switzerland* Court of Common Pleas. *Saturday, December 17.*

HANNA, J.—*Silvers* sued on a note, and to foreclose a mortgage.

The paragraphs of the answer which it is material to notice are the second, third, fourth, sixth, and seventh.

The second averred that the plaintiff and defendant,

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v.
SILVERS.

Waincott, made an agreement, on the 11th of *November*, 1856, by which the plaintiff sold, and the defendant purchased, certain real estate, and the appurtenances, for 2,000 dollars, of which 1,000 dollars was, on that day, paid down, and the note sued on, and another of like amount, executed for the balance (and a deed executed to the defendant), and the mortgage made to secure the payment thereof; that plaintiff was to deliver possession of said premises and appurtenances on the first day of the next *March*, "in as good repair as they then were;" that there was a dwelling-house, at the time of the contract, on said land, in possession of said plaintiff, of the value of 600 dollars; that the same was, whilst so in the possession of said plaintiff, by his carelessness suffered to be consumed by fire.

To this there was a reply in denial.

The third paragraph is similar to the second, except that it does not aver any carelessness in the plaintiff in suffering said house to be consumed by fire. It also avers that the plaintiff had not built another house, &c., nor compensated the defendant, &c.

The fourth is similar to the third paragraph, except that it avers the house was destroyed by fire, in *January*, 1857, whilst under the sole control of the plaintiff.

A demurrer was sustained to the third and fourth paragraphs, because the facts stated were not sufficient.

The defendants filed a sixth paragraph to their answer, similar to the fourth, except that they aver therein that "at the time of making said contract of sale, and as a part thereof, it was agreed and stipulated, by parol, that plaintiff should retain the possession of said premises, house, and barn," &c., "from said *November* 11, 1856, until said first of *March*, 1857, at which time full and peaceable possession was to be delivered to defendants, of said premises, house, barn," &c., "in as good order, and in the same situation they then were," &c.; that in consideration of said promise, &c., said notes were executed, &c.; and it is further averred that "the plaintiff did not deliver up said premises," &c., "to defendants, on the first of *March*, 1857, in as good condition," &c., "as they were on the 11th of

November, 1856; nor could he, on account of the burning of said house, without rebuilding the same, which he did not do;" therefore, the consideration had failed, &c.

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SILVERS.

Demurrer filed; the causes assigned were that the agreement set up in said sixth paragraph was for the sale of real estate, and, being by parol, was void; that a contemporaneous parol agreement is thereby attempted to be set up to vary a deed, &c. The demurrer was sustained.

The defendants filed a seventh paragraph to their answer, in which they aver the purchase of the land, &c., the execution of the deed, mortgage, and notes, as in the sixth paragraph; but do not aver that it was a part of the contract of sale that the plaintiff was to retain possession, but aver that, at the time of the sale and conveyance, the plaintiff requested permission to remain in possession of said premises, &c., until the first day of *March*, 1857, and the defendants consented that he might, on condition that he would, on said first day of *March*, deliver said premises, &c., in the same condition and plight that they then were, which was agreed to, but which agreement was broken, &c., and damage sustained, &c., which is set up by way of counterclaim, &c.

There was a demurrer also sustained to this paragraph.

The only errors assigned, which we can notice, are, first, in reference to the ruling of the Court upon the demurrers; and, second, in regard to the form of the judgment.

We are not directly informed by any of the pleadings whether the defendants were ever put in possession of the premises purchased. The sixth and seventh paragraphs will be hereafter noticed in reference to this point.

It is insisted, in argument for the appellants, that, under the circumstances of this case, it was the duty of the vendor to deliver the property, at the stipulated time, in the condition it was in at the time of the purchase; and that he was responsible for the deterioration in value whilst in his hands, whether the same resulted from his negligence or not.

In controverting this proposition, several counter ones are advanced:

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v.
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First. That the agreement, being contemporaneous with the execution of the deed, should have been incorporated into it, to make it binding.

Second. That the agreement was by parol, and, therefore, void.

Third. That if the agreement was binding, no liability would attach, unless in case of gross negligence.

Fourth. That no injury could result to the appellants by sustaining the demurrer to the third, fourth, sixth, and seventh paragraphs of the answer, which would entitle them to a reversal of the case; because all the facts which, by law, they were entitled to give in evidence, could have been so given in under the second paragraph.

Fifth. That the defense attempted to be made by way of counterclaim, cannot be so set up.

Without attempting to decide upon each of the abstract propositions advanced, we will proceed at once to the main question. Ought the several demurrers to have been sustained?

We are of opinion the objection was well taken to the third, fourth, and seventh paragraphs of the answer, for the reason that they disclosed a sale of the lands—an executed contract; and by the agreement therein attempted to be set up, by which the vendor continued in possession, we understand the same to affect the parties as landlord and tenant, and that the rules of law applicable to such should control in this case, so far as a defense is made by those paragraphs. Whether possession was ever actually delivered to the purchaser or not, is not material; for the absolute deed in fee gave the right of possession, and the agreement thereafter made by the vendor, placed him in the position of a tenant, as before stated.

The law as between landlord and tenant, we understand to be, that the tenant is not responsible for buildings accidentally burned down, during his tenancy, unless he has expressly covenanted, or agreed, to repair. It is not sufficient to charge him, that he agreed, or covenanted, to surrender the premises, at the end of his term, in the same repair or condition they were in at the time of the contract.

Trigg v. Hally, 4 Humph. 493.—*Graham v. Swearingin*, 9 Yerg. 276.—*Maggort v. Hausberger*, 8 Leigh, 532.—*Fowler v. Bott*, 6 Mass. R. 63.—*Ellis v. Welsh*, *id.*, 246.—*Hallett v. Wylie*, 3 Johns. 44.—*Warner v. Hitchins*, 5 Barb. 666.

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As to the sixth paragraph of the answer, if it is to be viewed as an attempt to set up, in defense, a verbal agreement contemporaneous with the execution of the deed, it would be bad under the decision in *Chapman v. Long*, 10 Ind. R. 465. It could only be obligatory, to any extent, by being afterwards recognized and acted upon by the parties. This would, in effect, make it a new contract, as to possession, and subject it to the same rules of law governing the defenses attempted to be set up in the other answers. The demurrer was, therefore, correctly sustained to it.

There was a trial of the issues of fact; verdict and judgment for the plaintiff for the money then due, and that the mortgage be foreclosed, &c.

There was an objection to the form of the judgment, which is well taken. It does not appear of record that the Court made the proper inquiry, and passed upon the question, of whether the property could be sold in parcels, it appearing that the purchase-money was payable by installments, and secured by the same mortgage. See *Cubberly v. Wine*, at this term (1).

Per Curiam.—The judgment is reversed, and the Court directed to make that inquiry, &c.

E. Dumont, for the appellants.

S. Carter, for the appellee.

(1) *Ante*, 353.

Nov. Term,
1859.

WILLIAMS and Others v. CONNELLY and Others.

WILLIAMS
v.
CONNELLY.

The first general election for city officers in the incorporated cities of *Indiana*, was to be held, under the amendatory act of 1859, on the first *Tuesday* in *May* of that year.

Saturday,
December 17.

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—This was a complaint by *John S. Williams*, *George Ulrich*, and *Robert C. Gregory*, against *John Connelly*, *William Taylor*, and *Christian Embee*. The facts were agreed on by the parties, and are these:

The city of *Lafayette* was incorporated under an act approved *March 9*, 1857, and the first election, after it was incorporated, was held, in that city, on the first *Tuesday* of *May*, in that year, when there was elected, a mayor, two councilmen from each ward, a treasurer, city clerk, marshal, assessor, engineer, and street commissioner. At that election, the said *John S. Williams* was elected mayor, who, within the time prescribed by law, took the proper oath of office, entered upon the duties, &c., and served as mayor, the full term of two years. At the first meeting of the city council after the election, it was determined by lot, which councilman, in each ward, should hold his office one year, and, in like manner, which councilman should hold his office two years. The second general election, in and for the city, under the act of 1857, was held on the first *Tuesday* of *May*, 1858, at which there was elected one councilman from each ward, a city clerk, treasurer, marshal, assessor, engineer, and street commissioner; and at which one *William S. Ward* was elected a councilman from the fifth ward, who having taken the requisite oath, entered upon his duties as councilman. And at the same election, the said *George Ulrich* was duly elected treasurer, who took the oath of office, gave the required bond, and has continued to serve as treasurer for the full term of one year. On the 1st of *March*, 1859, an act, amending the act of 1857, was passed, and, on that day, approved. After this amendatory act took effect, and was

in force, the common council of said city ordered that, at the general election, on the first *Tuesday* of *May*, 1859, there should be elected, for the city, a mayor, two councilmen from each ward, a treasurer, marshal, city clerk, assessor, engineer, and street commissioner. At the election thus ordered, *John Connelly* was elected mayor, *William Taylor*, treasurer, and *Christian Embee*, a councilman from the fifth ward (with one *Owen Ball*, who was elected his own successor, the said *Embee* having been elected in the place of the said *William S. Ward*). *Connelly*, *Taylor*, and *Embee* have taken the necessary official oaths, &c., and are ready to enter upon the duties of the respective offices to which they have been elected, if they are authorized to do so by the act of 1859, under which they were elected.

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1859.

WILLIAMS
v.
CONNELLY.

Upon the above statement of facts, the case was submitted to the Court, and, on final hearing, it was adjudged that a writ of prohibition issue against *Taylor* and *Embee*, commanding them to refrain and desist from entering upon the respective offices severally claimed by them, and that the suit as to *Connelly*, be dismissed, &c.

Williams, *Taylor*, and *Embee* each moved for a new trial; but their motions were overruled.

Whether the decision of the Circuit Court is, or is not, correct, depends upon the construction to be given to the statutory enactments referred to in the statement of facts. The first section of the act of *March*, 1857, repealed all general laws then in force for the incorporation of cities. The second, third, fourth, fifth, sixth, and seventh sections relate to the manner in which towns may change their organization and become cities. The eighth provides that the trustees of such town, the steps necessary to effectuate the proposed change of organization having been taken, "shall divide the city into wards, and give notice that an election will be held, on a day and at the places therein named, for the election of city officers." The ninth section is as follows: "The officers of a city shall consist of a mayor, two councilmen from each ward, a city clerk,

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treasurer, marshal, assessor, engineer, and street commissioner. All such officers, elected at any special election, shall hold their offices until the next general election, on the first *Tuesday* in *May*, and until their successors shall be elected and qualified. After said first general election, said officers shall respectively hold their offices as follows, to-wit: the mayor, two years, the clerk, treasurer, assessor, marshal, and street commissioner, one year each, and the councilmen shall be chosen by the legal voters of their respective wards, and one councilman from each ward, to be determined by lot, at the first regular meeting after their election, shall hold his office one year, and the other, to be determined in like manner, shall hold his office two years; and annually thereafter, one councilman shall be elected by the legal voters of each ward; and all of said officers shall hold their respective offices, during their respective terms, and until their successors are elected and qualified."

Thus, it will be seen that the term for which *Williams* was elected mayor, as also the term for which *Ulrich* was elected treasurer, expired on the first *Tuesday* of *May*, 1859; and that the councilman elected on the first *Tuesday* of *May*, 1858, is entitled to hold until the first *Tuesday* of *May*, 1860, unless the respective terms of the two former have been extended, and the term of the latter shortened, by the act of *March* 1, 1859. By that act, § 9, above quoted, was amended so as to read thus: "The officers of said city shall consist of a mayor, two councilmen from each ward, a city clerk, treasurer, assessor, engineer, marshal, and street commissioner. All such officers, elected at any special election, shall hold their offices until the next general election, on the first *Tuesday* in *May*, and until their successors shall be elected and qualified. After the first general election, said officers shall respectively hold their offices for two years each. The councilmen shall be chosen by the legal voters of their respective wards; and one councilman from each ward, to be determined by lot at the first regular meeting after the election, shall hold his office for two years, and the other, to be determined in like man-

ner, shall hold his office four years, and biennially thereafter, one councilman shall be elected by the legal voters of each ward."

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V.
CONNELLY.

The purpose of these amendments is to change the terms of councilmen from one and two, to two and four, years, and to make the terms of all the other officers, two years each. When were these changes to take place? This is the only question to settle.

The act, as amended, took effect *March 3, 1859*. When it was passed, there was a law in force providing for general annual elections on the first *Tuesday of May*, in each year. That law was not repealed by the amendatory act, and is still in force, consequently, the first general election, after the amending act took effect, was to be held on the first *Tuesday of May, 1859*.

We are of opinion that the amendatory act was intended to apply as well to cities already organized, as to cities to be thereafter organized, and that properly construed, it provides that two councilmen from each ward, and all other city officers, should be elected on the first *Tuesday of May, 1859*, that being the day on which the first general election, after the act took effect, was, by law, to be held.

It follows, the judgment of the Circuit Court, so far as it directs "a writ of prohibition to issue against *Taylor and Embee*," be reversed—and the judgment as to *Connelly*, be affirmed.

The judgment against *Taylor and Embee*, is reversed. The judgment in favor of *Connelly*, is affirmed. Costs against *Gregory, Ulrich, and Williams*.

J. S. Williams, for the appellants.

R. C. and J. Gregory, for the appellees.

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1859.

DAVIS
v.
SCOTT.

DAVIS, Administratrix, v. SCOTT.

APPEAL from the *Fayette* Circuit Court.

Saturday,
December 17.

Per Curiam.—The appellant, who was the plaintiff below, brought an action against *Scott*, to recover the possession of the south half of lot No. 4, in the town of *Connersville*.

The defendant's answer contains two paragraphs; the first is a general denial, and the second a special defense. To the latter there was a reply.

The issues were submitted to the Court, who found for the defendant, and having refused a new trial, rendered judgment, &c.

The errors are thus assigned—

1. The decision and judgment of the Court is not sustained by the evidence.
2. That the judgment of the Court is contrary to law.
3. There is error of law occurring at the trial, and excepted to by the party making the application.

The second and third assignments are too general, and cannot, therefore, be noticed. The statute requires a specific assignment of all errors relied on to be made. 2 R. S. p. 161, § 568.

This case, however, turns upon the weight of evidence. It is all upon the record. We have examined the evidence carefully, and are decidedly of opinion that it fully sustains the finding of the Court.

The judgment is affirmed with costs.

J. S. Reid and *S. Heron*, for the appellant.

N. and G. Trusler, for the appellee.

FRANTZ and Others v. HARROW.

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v.
HARROW.

Strong v. Clem, 12 Ind. R. 37, approved.

Where land was sold at sheriff's sale in 1844, though irregularly, it was held that an action to recover it from the purchaser, by the execution-defendant, or any one claiming under him, was barred in ten years; and that, by the R. S. 1852, inchoate dower in such land was abolished.

APPEAL from the *Montgomery* Circuit Court.

Monday,
December 19.

WORDEN, J.—Complaint by the appellee against the appellants for the assignment of dower in certain lands, with a count claiming one-third of the land in fee.

On the trial, it was adjudged that the plaintiff was entitled to be endowed of the lands, and her dower was ordered to be set off to her.

Motions for a new trial were made by both parties, and overruled, and exceptions taken.

It appears that the husband of the plaintiff died in *September*, 1853, but the lands in controversy were sold upon executions against him in 1844, and are in possession of the defendants claiming title under such sale.

The case of *Strong v. Clem*, 12 Ind. R. 37, decides that, in such case, the widow is not entitled to dower, nor to one-third in fee of the land. We have been strongly pressed to reconsider the case; but it was decided upon mature deliberation, and we find no substantial basis on which to rest a contrary conclusion; hence, that case will be adhered to.

Another point, however, is made by the appellee, which is that the title to the land was in her husband at the time of his death, and that, consequently, she is entitled to one-third in fee; and she asks that the judgment be reversed on a cross error assigned by her.

The ground taken is, that the lands were not sold in accordance with the proper appraisement laws, and that, therefore, no title passed to the purchasers. The lands were sold on several executions, some of which were not subject to appraisement; some were to be governed by the law of 1841, and some by the law of 1842. The land

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HARROW.

was sold in accordance with the law of 1841, for one-half of its appraised value.

We have not examined the sales with the care which they otherwise would have required, for the reason that we think it too late to take advantage of the defect, if any existed. These sales were made in 1844, and this suit was not commenced until *August*, 1855.

By § 13, R. S. 1843, p. 456, it is provided that "No action for the recovery of any real estate, sold as prescribed in the preceding sections of this article, shall be brought by the debtor, or his heirs, or by any person claiming under him, by virtue of any title, right, or interest acquired from or through the debtor, after the rendition of the judgment or decree under which such sale was made, unless such action shall be brought within ten years after such sale."

The same provision is, in substance, reenacted in the code of 1852. 2 R. S. p. 75, § 211. *Vide Vancleve v. Milliken*, at the present term (1). The widow, if she be entitled to one-third of the land in fee, would seem to take it as heir to her husband. The law entitling her to it, declares that it shall descend to her. 1 R. S. p. 250, § 17. At any rate, she claims under her husband, and is within the limitation above enacted.

Section 217 of the limitation law of 1852 provides that, "If any person entitled to bring, or liable to, any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may be brought, at any time, after the expiration of the time limited, within eighteen months after the death of such person."

This section, however, does not entitle the plaintiff to recover. The suit was not brought within eighteen months after the death of the husband. He died in *September*, 1853. The suit was commenced in *August*, 1855. Under this statute, as the ten years had not expired when the husband died, his wife would have had eighteen months within which to bring the suit, although that should overrun the ten years. But the ten years having expired, and

also the eighteen months after the husband's death, before the suit was brought, the action is barred. Nov. Term,
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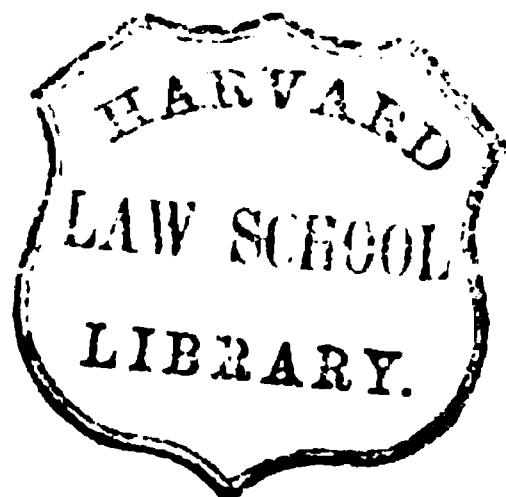
We are of opinion that the case made does not entitle the plaintiff to recover one-third of the land in fee, and, as she has no dower in the premises, the judgment will have to be reversed. THE INDIAN-
APOLIS, &C.,
RAILROAD CO.
V.
WHARTON.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Wilson and *J. E. McDonald*, for the appellants.

S. B. Gookins, for the appellee.

(1) *Ante*, 105.



THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
WHARTON.

In a suit against a railroad to recover for stock killed, the allegation that the road was not fenced is a material one, and must be proved, where such fact is an element in the right to recover.

APPEAL from the *Shelby* Court of Common Pleas.

*Monday,
December 19.*

PERKINS, J.—*Wharton* sued the *Indianapolis and Cincinnati Railroad Company* to recover for stock killed upon the road by the locomotives of the company. The suit was instituted before a justice of the peace.

The complaint alleged that the stock was killed at a point where the road was not fenced. It contained no allegations of other negligence of the company.

The cause went, by appeal, to the Common Pleas. In that Court there was judgment for the plaintiff.

The record contains all the evidence. There was no proof that the road was not fenced, or of any negligence, in running the locomotives, on the part of the company. We do not mean to admit that there could legally have been proof, under the complaint, of such negligence. The judgment is not supported by the evidence. The allega-

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THE STATE.

tion that the road was not fenced was a material one—one on which, after the fact of killing was proved, the plaintiff's case rested. Without proving that allegation, he made out no case. As there was no proof going to establish the truth of that allegation, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Scobey, for the appellants.

J. B. McFadden, for the appellee.

DENNISON v. THE STATE.

In manslaughter there may be intention to kill, arising in the sudden transport of passion, but it may, and in this grade of offense must, be unaccompanied by malice.

Monday,
December 19.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Indictment for an assault and battery, with intent to commit murder. Conviction and sentence for two years to the state prison.

On the trial, the Court instructed the jury, among other things, as follows:

“To sustain a charge of assault and battery with intent to murder, the circumstances surrounding the transaction must be such that if death had resulted it would have been murder.

“If the killing would only have been manslaughter; or if the defendant only intended to do great bodily injury, the defendant should be acquitted of the intent to murder.

“As to the provocation, which will reduce killing to manslaughter, it must be considerable and not slight only.” [It should be such as is deemed in law sufficient to deprive the party of deliberation. U. S. Crim. Law, p. 396.]

“Proof of reproachful words, however grievous, or of

actions or gestures expressive of contempt or reproach, without an assault, actual or menaced, on the person, will not be sufficient, if a deadly weapon be used. Nor will the circumstances that the slayer destroyed the life of the person slayed from sudden transport of passion, or heat of blood, be sufficient to reduce killing to manslaughter. There must be a reasonable provocation to cause such sudden transport of passion, or heat of blood; and if without such provocation, or if the blood has had reasonable time to cool, after such provocation was given, and before the fatal blow or wound is inflicted; or if there be evidence of express malice, that is, a positive intention to kill, existing in the mind of the slayer, at the time of inflicting the wound, the killing is murder in the second degree."

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V.
THE STATE.

This latter instruction contains an error, which may have misled the jury. It informs them that intention to kill, existing at the commission of the act, constitutes express malice. This is entirely wrong.

In justifiable homicide, there is intention to kill, but not necessarily malice or premeditation.

In murder in the first degree, there is intention to kill, accompanied with premeditated malice, except in certain cases in which certain acts are made murder by statute.

In murder in the second degree, there is intention to kill, accompanied by malice, but without premeditation.

In manslaughter, there may be intention to kill, arising in the sudden transport of passion, but it may, and must, in this grade of offense, be unaccompanied by both premeditation and malice. See U. S. Crim. Law, p. 397.

If a sane man, without accident, justification, or any provocation, suddenly kill another, even a stranger, the act must be attributed to malice, because it could be accounted for upon no other hypothesis, based upon the laws governing the action of the mental and moral faculties of man. Such an act would evince a degree of depravity of heart, almost excluding the possibility of any higher moral feeling than malice against all mankind. But human experience will bear witness that provocation may excite a

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transport of passion, accompanied by a momentary intention to kill the dearest and most beloved friend, against whom no malice exists. And passion, upon sufficient provocation, tends to rebut the presumption of malice.

This is expressly laid down in *Pennsylvania v. Honey-moon*, Addis. 147, and in *Pennsylvania v. Bell*, *id.* 156. These cases draw with clearness the distinctions on this subject. So, also, does the case of *Pennsylvania v. Poke*, reported in Lewis' U. S. Crim. Law, p. 394, and largely quoted from in 2 Wat. Arch. Crim. Law, p. 231.

In this last case, Judge Lewis says: "The prisoner is guilty of voluntary manslaughter, by reason of the existence of an intention to kill, suddenly executed, without justification or excuse, in a passion, occasioned by provocation from the deceased."

And under our laws, the question of malice would be for the jury. The law does not conclusively impute malice to an intention to kill, suddenly formed, in the heat of passion, upon sufficient provocation.

The same doctrine has been applied in this Court, upon the question of malice in actions of slander, where it is held that anger is not malice; but that sudden anger, or passion, and malice may coëxist, and whether they do or not, in the given case, will be a question for the jury. *Brown v. Brooks*, 3 Ind. R. 518.

In cases of homicide, there may be express malice accompanying transport of passion, and there may not be. This will be for the jury. See Walk. Am. Law (3d ed.), p. 491.

Per Curiam.—The judgment is reversed with costs. Cause remanded for another trial—the keeper of the state prison to be notified to return the prisoner to the *Marion* county jail.

H. Cravens, W. R. Pierce, R. L. and T. D. Walpole, for the appellant.

J. E. McDonald, Attorney General, and *A. L. Roache*, for the state.

SMITH *v.* CHANDLER and Others.Nov. Term,
1859.SMITH
v.
CHANDLER.

Counter-affidavits are not admissible on an application for security for costs on account of non-residency.

A complaint for an injunction, need not aver that a bond has been filed.

A justice of the peace cannot vacate a judgment rendered by him in a suit between parties, on the application of one, without notice to the other party.

APPEAL from the *Warren* Court of Common Pleas. *Monday, December 19.*

HANNA, J.—The facts averred in the complaint, by *Smith*, so far as we need notice them, are: That *Chandler* recovered a judgment before *Clinton*, a justice, against *Smith*; that within the time fixed by the statute, *Smith* applied for, and obtained, a new trial; that upon the second trial, *Smith* had a verdict and judgment in his favor; that afterwards, “without notice to the said *Smith*, the justice, at the request of said *Chandler*, or his attorney, rubbed out or scratched out said judgment in favor of said *Smith*, and issued an execution on the first judgment;” that said execution is in the hands of *Dean*, the other defendant, who threatens to levy upon the property of plaintiff, &c.; that the judgment in favor of plaintiff is in full force, &c. An injunction was prayed.

An affidavit was filed by *Dean*, averring that “plaintiff has told this defendant, a number of times, that his residence is in the state of *Iowa*,” but does not aver that, in fact, his residence is without the state.

The plaintiff offered to file counter-affidavits, showing that his residence was in this state. The Court refused to permit him to file said affidavits, and ordered him to give security for costs; to which rulings he excepted.

We think the ruling of the Court below was right, in refusing to receive counter-affidavits, but was wrong in making the order upon the affidavit of *Dean*. The affidavit does not show that the residence of the plaintiff was out of the state; it does not even state that the affiant believed it to be so.

The defendants then demurred to the complaint for two causes—

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v.
DENNIS.

1. That it does not state facts sufficient, &c.
2. That it does not show that a bond was filed and a release of errors entered, &c.

The complaint need not disclose whether a bond is filed or not. This is a question of practice, not of pleading, to be determined upon the hearing.

The statute provides that, "In applications to stay proceedings after judgment, the plaintiff shall indorse upon his complaint a release of errors in the judgment, whenever required to do so by the judge or Court." 2 R. S. p. 61, § 145.

This statute is not applicable to the facts in the case at bar. Here, the facts averred in the complaint show, that the first judgment rendered was vacated, set aside, and that really, there exists no judgment upon which the execution, in the hands of the officer, could issue. The justice had no authority, in the form it is alleged he proceeded, to vacate the second judgment, without notice, and to reinstate the former judgment. His proceedings in that respect, were a nullity. For these reasons, no release of errors was necessary, and the demurrer should have been overruled on that point, as well as upon the first point.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. H. Brown, for the appellant.

R. A. Chandler, for the appellee.

STRONG v. DENNIS.

Monday,
December 19.

APPEAL from the *Kosciusko* Court of Common Pleas.

Per Curiam.—In 1844, one *Jones* conveyed his land (his wife not joining in the deed), and after the 6th of *May*, 1853, died, his wife surviving. *Dennis* claims the whole

of the land under the grant of *Jones*. *Strong*, under the widow, claims the one-third in fee. Nov. Term,
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This case is settled by that of *Strong v. Clem*, 12 Ind. R. 37. STEPHENS
v.
SCOTT.

The judgment is affirmed with costs.

B. F. Claypool, for the appellant.

STEPHENS v. SCOTT.

In an action to recover personal property, a complaint sworn to, may constitute a complaint and an affidavit.

In such an action a verdict that the plaintiff recover the property with one cent damages for its detention, is good.

APPEAL from the *Carroll* Court of Common Pleas. Monday,
December 19.

HANNA, J.—*Scott* brought suit before a justice to recover a horse. Verdict and judgment for the plaintiff. The defendant appealed, and, in the Common Pleas, moved to dismiss the case for want of a complaint and affidavit. Before the decision of the motion, the defendant, averring that said papers were lost, asked leave to substitute copies, which was granted, whereupon he filed a paper sworn to. The defendant insists that it is only an affidavit, and that a complaint is absolutely necessary, under our present code.

If a complaint, in such case, is necessary, we are of the opinion that the paper filed is a sufficient one, verified by the oath of the complainant, to make it both a complaint and affidavit.

A great many exceptions appear, by bills of exceptions incorporated in the record, to have been taken during the progress of the case, to various rulings of the Court; but these bills of exceptions were filed some three months after the determination of the case; only thirty days were given to prepare them, consequently, they are not legitimately a

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v.
ELLIOTT.

part of the record, and the points attempted to be made upon them, as parts of the record, cannot be considered.

The verdict was, that the property belonged to the plaintiff, and that he should recover the same and one cent damages for the detention thereof.

A motion was made to arrest the judgment, and it is insisted that the verdict is too indefinite to justify the Court in rendering a judgment thereon, and that the jury should have found to whom the right of possession belonged.

We are of opinion that the right of property having been found in the plaintiff, the balance of the finding, namely, of damages against the defendant for the detention, sufficiently shows that the right of possession was also in the plaintiff, if that is, now, a necessary part of the verdict, under the statute.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

L. Chamberlain, for the appellant.

WOODWARD v. ELLIOTT and Others.

Payment to extinguish a bill of exchange must be to the real proprietor, where the relation to it, of all parties interested, is known.

Monday,
December 19.

APPEAL from the *Daviess* Court of Common Pleas.

WORDEN, J.—Action by the appellant against the appellees, on a bill of exchange drawn by *Cox, Angel*, and *Pitt*, in favor of *Joseph A. Moffit*, upon the defendants, and by them accepted, and indorsed by *Moffit* to the plaintiff.

There was, amongst other defenses set up, a plea of payment to the holder before the commencement of the suit. The bill was for 289 dollars, 30 cents.

Trial; verdict for plaintiff for 76 dollars, 12 cents. Motion for a new trial made by plaintiff, and overruled; exception, and judgment.

There seems to be no question involved, except as to the payment, in part, of the bill. Nov. Term,
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To sustain the plea of payment, the defendants proved, that they sent 235 dollars to *Cox, Angel, and Pitt*, the drawers of the bill, and it may fairly be inferred, from the evidence, that the money was received by them. But it is difficult to perceive how this could operate to extinguish the bill *pro tanto*, it being then in the hands of the payee, or his assignee. By the acceptance of the bill, the defendants did not become bound pecuniarily to *Cox, Angel, and Pitt*, the drawers of the bill, but to *Moffit*, the payee; and *Moffit's* assignment of the bill to the plaintiff, transferred to him all his rights. WOODWARD
V.
ELLIOTT.

Payment, in order to extinguish the bill, should be made to the real proprietor. Even payment to the payee will be inoperative, if he have ceased to be the proprietor of it by having indorsed it to another person, and the drawee have notice of the fact. Chit. on Bills, 393. Payment by the acceptor to the drawer, could no more affect the rights of the payee, or his indorsee, than the bestowal of so much money to a person not a party to the bill. Besides this, it is shown by the evidence that the defendants, at least one of them, was notified by the plaintiff that he was the holder of the bill before the money was sent to *Cox, Angel, and Pitt*.

We are of opinion that the defense of payment wholly failed, and that the motion for a new trial should have prevailed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Crawford, for the appellant.

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1859.

THE INDIAN-
APOLIS, &C.,
RAILRO'D CO.

v.
REMMY.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY
v. REMMY and Another.

A suit against a carrier for a breach of his contract as such, should be upon the bill of lading, under the code, where such a bill is given, and embraces the terms of the contract.

The terms of such bill of lading cannot be varied by parol evidence.

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December 20.

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APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—*Remmy* and *Spaugh* sued the *Indianapolis and Cincinnati Railroad Company*, for a failure to deliver, in time and condition, freight, consisting of certain car loads of hogs. The complaint states that the company “agreed to and with the plaintiffs that, in consideration of the payment of a large sum of money, to-wit,” &c., “the said company would carry said hogs with all proper care and speed,” &c., “to,” &c.; “and that in pursuance of said contract,” &c., the hogs were delivered and received, &c.

The agreement is not alleged to be in writing.

For breach, it is averred that, through carelessness and negligence, the hogs were not delivered with proper speed and in good condition, &c.

Trial upon the general denial of the complaint; judgment for the plaintiffs.

On the trial, it turned out that the hogs were received upon a written contract, called a bill of lading, showing how many car loads of hogs were received, and at what point; also, the point at which they were to be delivered, and the price to be paid for transportation; that they were to be transported “without unnecessary delay, and delivered in as good condition as they then were in;” and containing, further, a number of stipulations in regard to the duties and liabilities, and exemptions therefrom, of the company. The written contract was given in evidence.

The Court, in effect, instructed the jury that, though the bill of lading stipulated that the hogs were to be transported “without unnecessary delay,” yet the plaintiffs might prove by parol that, “about the time the written contract was entered into,” one *Jacob Mills*, an agent of the

company, but one who had nothing to do with making the written contract, told the plaintiffs that the hogs should be shipped that night, and that such statement might have effect as a part of the contract. This is not the language, but it is the import of the instruction. Exception was taken.

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THE INDIAN-
APOLIS, &C.,
RAILROAD CO.
v.
RENNY.

The instruction was erroneous. The bill of lading contained an express stipulation on the subject, viz., that the goods were to be transported without unnecessary delay, and that stipulation could not be varied by parol evidence.

In a standard work on carriers, it is laid down that parol evidence is not admissible to vary the common form of a bill of lading in regard to the stipulations as to the condition in which the goods were to be delivered, with the exceptions, &c. Ang. on Car. § 229. So, "a parol agreement between the master of a vessel and a shipper of goods, before and at the time of executing a bill of lading, permitting the master to deviate from the usual route, is inadmissible evidence in an action by the shipper against the owners of the vessel, to recover for the loss of the goods." *Id.*, § 228.

As to how far carriers may exempt themselves from liability by stipulations in a bill of lading, see *Wright v. Gaff*, 6 Ind. R. 416.

The point is made that the bill of lading, disclosed in the evidence, should have been counted upon as the foundation of the action, and the Court is unanimously of that opinion. The complaint in this case is clearly for a breach of contract; and the contract actually broken, it appears, was a written contract. And where a suit is for the breach of a contract, the suit, in legal parlance, is said to be founded upon the contract. It is so even in cases of promissory notes. The suit is justified by the breach of the contract to pay, but is said to be founded upon the note. But the code provides that where any pleading is founded on a written instrument, the instrument, or a copy of it, must be filed with the complaint, and shall become a part of the record without being copied into the pleading. 2 R. S. p. 44.—Perk. Pr. 170. And this Court has held that, where

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it appears that such written instrument exists, and should properly be made the foundation of the action, it must be made so. This is the spirit of the statute. *Id.*, p. 222.

Here, there was a bill of lading, embracing all the terms of a contract touching the subject-matter involved—a contract, by the written terms of which, the parties were bound, and their rights and liabilities to be determined—a contract of a high and fixed character, which could not, as we have seen, be varied by parol evidence; and we are clear that it should have been referred to in, and filed with, the complaint. As this case stood, if the fact of the written contract had been disclosed, it would seem that parol evidence must have been excluded, because of the written, and the written, because not sued on.

The bill of lading was not, in this case, a mere receipt. It contained the terms of a complete contract. See *Pribble v. Kent*, 10 Ind. R. 325; *Henry v. Henry*, 11 *id.* 236.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Gavin and *O. B. Hord*, for the appellants.

J. S. Scobey and *W. Cumback*, for the appellees.

BOLTON v. FITZGIBBON and Another.

Tuesday,
December 20.

APPEAL from the *Hamilton* Court of Common Pleas.

Per Curiam.—Suits on promissory notes. Judgment by default. No motion below to set aside the judgment. We might dismiss the appeal. We have looked through the record, and find that it contains no error.

The judgment is affirmed with 5 per cent. damages and costs.

D. Moss and *J. W. Evans*, for the appellant.

A. A. Hammond, for the appellees.

Mix and Others v. THE STATE BANK.

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 MIX
v.
THE STATE
BANK.

A promissory note payable at a bank out of this state is not governed by the law merchant, but a bill of exchange is.

As a general rule, a joint suit cannot be maintained against the maker and assignor of a promissory note not governed by the law merchant; but facts which will excuse a prior suit against the maker before resorting to the assignor, may justify such joint suit.

APPEAL from the *Tippecanoe* Circuit Court.

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PERKINS, J.—The bank instituted a joint suit against the maker and indorsers of a note, as follows:

“\$1,948. *Lafayette, Indiana, May 3, 1856.*

“Three months after date, I promise to pay to the order of *Benbridge and Mix and James Spears*, nineteen hundred and forty-eight dollars, at the *American Exchange Bank, New York City*, without relief from valuation or appraisement laws, for value received. *James Mix.*

“Pay *State Bank of Indiana*, or order,

“*Benbridge and Mix, and James Spears.*”

There is no averment in the complaint showing legal diligence in attempting to collect the note of the maker; nor is there any excuse assigned for the failure to use such diligence.

The Court below rendered a joint judgment against all the defendants.

The note sued on was not governed by the law merchant. Foreign and inland bills of exchange are governed by that law, as being a part of the common law. This was established, as to foreign bills, in the fourteenth, and as to inland bills, in the seventeenth century. *Chit. on Bills*, p. 11.

Promissory notes, in *England*, were put, by the statute of *Anne*, upon the same footing early in the eighteenth century. *Chit. supra*, 518.

That statute is not in force in this state. But we have one, upon the same subject, of a more limited character. It provides that all notes payable at a chartered bank, in

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this state, shall be put upon the footing of bills of exchange, that is, be governed by the law merchant. And by the law merchant, where payment of a note or bill has been duly demanded, and notice duly given of failure to pay, the maker and indorsers become at once jointly, as well as severally, liable to the holder. Not so, where the note is not governed by the law merchant. Upon such notes, the indorser is not liable to the holder, or indorsee, till the latter has prosecuted the maker, with due diligence, to judgment and execution, unless an excuse for the failure to take such steps exists; and where an excuse is relied upon, it must be averred in the complaint. This is the requirement of a further statute. See 1 R. S. p. 378; Ind. Dig., p. 200.

Where an excuse for a separate, prior suit against the maker exists; or where any facts exist rendering the indorsers immediately liable to the holder for the whole or a part of the note, as where there has been no consideration for a part of the note, or payment to the assignor of part, in such cases, a joint suit may be instituted, under § 16, 1 R. S. p. 379, against the maker and indorsers of a promissory note not governed by the law merchant; but the complaint must show such facts.

In the case at bar, the note is not governed by the law merchant, and no facts are alleged, in the complaint, showing a liability on the part of the indorsers to the holder, before the termination of separate proceeding, fruitless in whole or in part, against the maker. See *Swift v. Ellsworth*, 10 Ind. R. 205; Perk. Pr. 133.

Per Curiam.—The complaint shows no cause of action against the indorsers, and, as to them, it must be reversed with the costs made against them; and as to the maker, the judgment is affirmed with costs made against him.

S. A. Huff and *R. Jones*, for the appellants.

J. E. McDonald and *A. L. Roache*, for the appellee.

LEEDY *v.* CRUMBAKER and Others.Nov. Term,
1859.WILLIAMS
v.
WILLIAMS.APPEAL from the *Huntington* Circuit Court.

Per Curiam.—The complaint in this case contained a good cause of action. A note made payable to husband and wife, on a loan of money by the husband, is, in legal effect, payable to the husband, and the right to sue on it survives to him. *Reeve's Dom. Rel.*, p. 127.

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If a father conveys his farm to a child in consideration of an obligation to support himself and wife during life, the obligation is valid. So, such an obligation may be valid on an advancement of money. See *Leach v. Leach*, 4 Ind. R. 628.

The judgment is reversed with costs. Cause remanded, &c.

J. U. Pettit, C. Cowgill, and S. P. Milligan, for the appellant.

D. O. Daily, for the appellees.

WILLIAMS *v.* WILLIAMS and Another.

13	523
128	312
186	523
146	446
13	523
Case 2	
168	359

Where, upon granting a divorce, the Court, in its judgment, assigns the custody of the children to one of the parties, such disposition of the children will control, till the judgment making it is modified by the Court, upon proper application; and cannot be disregarded in a subsequent proceeding by *habeas corpus*, to obtain possession of the children.

APPEAL from the *Greene* Court of Common Pleas.Tuesday,
December 20.

HANNA, J.—In *April*, 1854, the *Greene* Circuit Court, upon the application of *Margaretta Williams*, dissolved the bonds of matrimony existing between her and *Daniel Williams*, and, in pursuance of an agreement of the parties, as appears by the record, gave her 500 dollars alimony, and the custody, for four years, of *John E. Williams*, their infant son, and decreed “that afterwards said defendant

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WILLIAMS.

is to have the perpetual control of the said *John E. Williams*; and have leave, at all proper times, to see and converse with said child."

After the expiration of the four years, said *Daniel Williams*, before the judge of the Common Pleas Court, sued out a writ of *habeas corpus*, alleging the above facts, and setting forth the record of said divorce, and also averring that he had demanded the custody of the child, which had been refused, and that it was detained, &c., by said *Margaretta*, and *James C. Plume*, her father, &c.

A writ of *habeas corpus* was issued, which was returned with the separate answer of the said defendants.

Plume answered that *Margaretta* was his daughter, and had lived at his house since her divorce; that the child was not under his control, nor restrained by him; that if the Court should decree the custody of the child to its mother, he was able and willing to provide for and educate it, &c.

Margaretta answered, in her return, that she had the body of the child before the Court, and for cause of its detention alleged that she was its mother, and had had the care and control of it from its birth, except when prevented by said *Daniel*; that she was divorced from said *Daniel* for his misconduct; that her father made an agreement as to the custody of said child, during the pendency of the said application for divorce, and that she had always understood that she was to have the custody of said child for four years and longer, unless deprived of the same by order of the Court; that said *Daniel* is a person of bad character, of bad habits and temper, and indulges in bad language, &c., has no education, and will, as she believes, neglect the education of the said child, &c.; that she resides with her father, and has 500 dollars of her own, and is able to educate the child; that it is much attached to her, and she to it; that said *Daniel* is again married, and, she believes, cannot have much affection for said child, as he has manifested no concern for its welfare, &c.

The plaintiff excepted to each of said returns, and filed the said exceptions in writing, stating, first, that neither of

said returns stated facts sufficient, &c.; second, that said *Margaretta* is estopped, by the record, from denying that she was a party to the agreement and decree, made in relation to the custody of said child, at the time of granting said divorce, &c.

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WILLIAMS
v.
WILLIAMS.

The exceptions so filed were overruled, and the plaintiff ordered to reply; to which ruling the plaintiff excepted, &c.

This raises the first question in the case. As to the return of *Plume*, we do not see but that the answer was sufficient; in other words, the exception was not well taken. The record in the divorce case could not be collaterally controverted by the said *Margaretta* as to the matters properly stated therein. It was, between the parties, conclusive, while in force, as to the matters thereby legitimately determined.

The questions before the Court, in that case, were as to the divorce, and, also, as to the custody, &c., of the child. The statute (2 R. S. p. 237, § 21) makes it the duty of the Court, in granting a divorce, to "make provision for the guardianship, custody, support, and education of the minor children of such marriage." This may be done by assigning such guardianship, &c., to the father, or to the mother, together with such reasonable sum, called alimony, as the Court may decree, in view of the circumstances of the case, &c. 2 R. S. p. 237, § 19.—*Rourke v. Rourke*, 8 Ind. R. 427.—Bish. on Mar. and Div., §§ 634, 639, 640. Or to a stranger. 2 R. S. p. 237. But if to a stranger, the father is responsible for the maintenance, &c., of the child.

In the case at bar, the decree for alimony stands in lieu of any claim which the wife had as to the husband's property, and, also, of any compensation, that she might claim, for the support of said child for the said four years. 2 R. S. p. 237.—*Rice v. Rice*, 6 Ind. R. 100.—*Whitsell v. Mills*, *id.* 229.

Whether circumstances might have arisen, during that four years, which would have given the same Court the right to have changed the amount of the allowance, is

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a question not before us. See Bish. on Mar. and Div., §§ 593, 634, and authorities cited. But that circumstances might intervene, after the expiration of the four years, that would make the father responsible for the maintenance, &c., of the child, unless he should, in some way, discharge himself therefrom, we think can admit of but little doubt. *Cowls v. Cowls*, 3 Gilm. 435.

It is manifest, then, that the return of said *Margaretta* was not sufficient, first, because she could not directly, nor indirectly, contradict the record of the divorce, &c., in this proceeding; and, secondly, because the facts stated do not, whilst that decree stands, show any sufficient reason for failing to obey its injunctions, in view of the proceedings in which, and the tribunal before which, the said facts were produced.

Whether such facts would have been sufficient, if properly produced in the Court which granted the divorce, to have authorized a change of the original order, is a question not before us.

The plaintiff then replied, first, by a denial; second, that he performed the agreement and decree of the Court, &c., and the said *Margaretta* failed, &c., in refusing to permit him to see the child, &c., and also in refusing to deliver it up, &c., upon demand, &c., and has started unfounded reports of his habits, &c.; that he is able and willing to care for and educate said child, &c.

By consent of parties, a jury was impaneled, to whom, after the evidence had been heard, the Court submitted the following issues to be tried:

1. "Which is the more suitable person to have the custody of *John E. Williams*—*Daniel Williams* or *Margaretta Williams*, at the present time?"

2. "Does *James C. Plume* detain *John E. Williams* from plaintiff?"

The jury found that *Plume* did not detain the child, and that *Margaretta Williams* was "the more suitable person to have the custody of *John E. Williams*, at this time."

The plaintiff then moved for a new trial, and filed two causes—

1. That the verdict is contrary to law and evidence.

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2. That the Court erred in giving, and refusing to give, instructions.

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WILLIAMS.

The motion was overruled.

The record informs us that the Court instructed the jury, "that, in making up their verdict, they should not take into consideration the record in the divorce case between said plaintiff and defendant, which was offered in evidence on this trial by the plaintiff." And, also, refused to instruct the jury, "that the further welfare and interest of the infant should be taken into consideration as well as its present interest and welfare;" but did instruct, among other things, that they "should only take into consideration its present interest and welfare."

It is evident that the first instruction given was wrong. It is only upon decreeing a divorce that the Court can make a final order, as to the custody of the children, by the statute. 2 R. S. p. 237, § 21. Interlocutory orders, relative thereto, may be made, pending an application for divorce. *Id.*, § 17. Without those statutes, the father, by the common law, would have the right to the custody of the child, when it is legitimate. *McPhers. on Infants*, 52 to 62.

This being the fact, it was necessary that it should appear, that the father and mother of the child were divorced, or that they were living separate, pending an application for a divorce, before the mother could at all claim the exclusive control and custody of the child. The highest and best evidence of the divorce was the record thereof, and, when introduced for one purpose, it was proper evidence, and should have been considered, in reference to all questions therein properly passed upon, and again attempted to be brought in issue.

Under the statute, the care and custody of the children of the marriage was a proper question for the Court, in decreeing a divorce, to pass upon; and having so done, that adjudication cannot be collaterally inquired into, it is manifest, as to matters preceding it, and which were directly involved and settled.

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WILLIAMS.

The plaintiff moved the Court for judgment in his favor, notwithstanding the verdict, on the pleadings and evidence.

The Court overruled the motion. There was error in this. The Common Pleas Court had no original jurisdiction, at that time, to try and determine divorces, and, therefore, could not entertain a proposition to modify the decree of a Court having such jurisdiction, either in regard to the divorce itself, or any matter which was merely an incident thereto, but such as the Court necessarily passed upon.

It is even questionable whether the Court, which granted the divorce, could, in such a proceeding as this, have inquired into, and modified the decree here relied upon; but upon this we decide nothing; but see Bish. on Mar. and Div., § 700, and authorities cited.

It is suggested, that the application, for the custody of the child, should have been made in the Court which granted the divorce, and as a part, or continuation, of that proceeding.

Without doubt, it would have been eminently proper for the application to have been so made; that all matters, which have since arisen, might have been heard and determined; but as the plaintiff sought to enforce, and not to change or modify the terms of that decree, we cannot perceive why he should not have the right to appeal to any Court having authority to enforce it, or aid in its enforcement.

By the statute, the Common Pleas judge has, not only the authority, but it is made his imperative duty, upon a proper application, to issue a writ of *habeas corpus*; 2 R. S. p. 20, § 23, and p. 194, § 716; and it shall be granted in favor of parents for the protection of infants, &c. *Id.*, p. 197, § 737.

As this decree stood, it was conclusive, between the parties thereto, upon the point here attempted to be again tried, namely, that after four years from the rendition thereof, it was to the interest of the child to be under the care of its father; for it is to be presumed the Court looked to that interest, in awarding the custody, and not to the mere gratification of the parents. Bish. on Mar. and Div., § 636, and

authorities cited. Such being the condition of affairs, it would seem that the Common Pleas had authority to lend its aid in enforcing this decree, but could make no inquiry which might result in a failure to so enforce it.

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v.
CRAIG.

The decree was subject to modification, or it was not. If not, then it must, if required, be carried out. If it was, then, if neither party has sought, in the proper manner, to procure a modification, if there is sufficient reason therefor, it follows that, if there is any apparent hardship upon such party, it is the result of that party's own negligence.

DAVISON, J., dissents from the above opinion.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Franklin, for the appellant.

J. H. Martin, for the appellee.

SMITH v. CRAIG.

APPEAL from the *Johnson* Court of Common Pleas. Tuesday,
December 20.

Per Curiam.—Suit on a note. Answer, that the note was given for a part of the consideration of land, and that plaintiff had no title thereto, &c. Reply, general denial. Motion to dismiss for want of jurisdiction, overruled. Judgment for plaintiff.

The only point made in the brief of appellant is, as to the jurisdiction of the Court. This question has been already decided. *Harvey v. Dakin*, 12 Ind. R. 481.

The judgment is affirmed with 10 per cent. damages and costs.

G. M. Overstreet and *J. B. Hunter*, for the appellant.

J. H. Williams, for the appellee.

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THOMPSON v. REYNOLDS and Another.

TONER
v.
MITCHELL.

Tuesday,
December 20.

APPEAL from the *Hamilton* Court of Common Pleas.
Per Curiam.—There is but one point made in the brief of appellant, which is similar to that raised in *Smith v. Craig*, at this term (1).

The judgment is affirmed with 10 per cent. damages and costs.

J. Green, for the appellant.

J. W. Evans, for the appellees.

(1) See the preceding case.

TONER v. MITCHELL.

Tuesday,
December 20.

APPEAL from the *Johnson* Court of Common Pleas.
Per Curiam.—The appellee, who was the plaintiff below, brought an action, in said Court, against *Toner*, upon a promissory note for 500 dollars, and, also, to foreclose a mortgage to secure its payment. Both note and mortgage were given to one *Martha Shelton*, and by her assigned to the plaintiff.

Defendant's answer contains three paragraphs. The first and second make no point in the case. The third admits the execution of the note; but avers that it was given to *Martha Shelton* in consideration of the sale and conveyance, by her to the defendant, of the "east half of the south-west quarter of section six, in township ten north, of range five east," and that, at the time of the sale, she had not, nor has she since acquired, any title whatever to the land, &c.

The plaintiff replied by a general denial.

And, thereupon, the defendant moved to dismiss the action upon the ground that the title to real estate was in

issue by the pleadings, and that, therefore, the Common Pleas had not jurisdiction; but his motion was overruled, and he excepted.

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The cause was then submitted to the Court, who found for the plaintiff 486 dollars. And having refused motions for a new trial and in arrest, rendered judgment upon the finding, and, for the payment thereof, ordered that the mortgaged premises, being the same described in said third paragraph, be sold, &c.

The action of the Court, in overruling the motion to dismiss, involves the only point in the case.

The statute enacts that the Common Pleas shall have no jurisdiction "where the title to real estate shall be in issue." 2 R. S. p. 18, § 11. It has, however, been decided that suits for partition are not within this general statutory rule, for the reason that the statute, in reference to these suits, expressly confers jurisdiction on the Common Pleas, and that the jurisdiction thus conferred, necessarily includes the power to settle the title to real estate, whenever, in such suits, it may be put in issue. *Wolcott v. Wigton*, 7 Ind. R. 44.—*Dixon v. Hill*, 8 *id.* 147.—*Holliday v. Spencer*, 7 *id.* 632.

We perceive no reason why, in cases to foreclose mortgages, the principle just stated, as applicable to partition suits, should not apply; and we are, therefore, inclined to hold that the jurisdiction given to the Common Pleas to foreclose mortgages, confers, also, the power, in such cases, to settle the title to the real estate whenever it shall be in issue. The motion to dismiss was correctly overruled.

The judgment is affirmed with 5 per cent. damages and costs.

S. P. Oyler, for the appellant.

G. M. Overstreet and *A. B. Hunter*, for the appellee.

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THOMPSON *v.* REEVES and Others.

HAUSER
v.
SMITH.

Tuesday,
December 20.

APPEAL from the *Hamilton* Court of Common Pleas.

Per Curiam.—The judgment in this case is affirmed for the reasons given in *Harvey v. Dakin*, 12 Ind. R. 481, the questions arising in the record of each case being similar.

The judgment is affirmed with 5 per cent. damages and costs.

J. Green, for the appellant.

J. A. Lewis, for the appellees.

HAUSER *v.* SMITH and Others.

A justice of the peace is not bound, of his own motion, to require security for costs, at, or before, commencing suit, from a non-resident plaintiff.

In actions commenced before a justice, in favor of a firm, it is sufficient if the names of the individuals composing the firm appear in the record; and if such suit be upon a note given to the firm, the partnership need not be proved unless the partnership, or the cause of action be denied under oath.

Tuesday,
December 20.

APPEAL from the *Bartholomew* Circuit Court.

DAVISON, J.—*Alden B. Smith, Edward A. Smith, and Edward Brankham*, partners under the name of "*A. B. Smith & Co.*," sued *Hauser* before a justice of the peace, upon a promissory note for 72 dollars, 15 cents. The note bears date *January 20, 1858*, was executed by the defendant, payable to *Benjamin F. Jones*, at one day, and was by him indorsed in this form, "Pay *A. B. Smith & Co.*, or order." Signed "*Benjamin F. Jones.*" The note with the indorsement was filed as the cause of action. Before entering into the trial, the defendant, having filed an affidavit alleging the non-residency of the plaintiffs, moved the justice to dismiss the cause for want of security for cost, but the defendant, pending the motion, gave the requisite

security, and thereupon the motion was overruled. He then moved to dismiss the action for want of a sufficient complaint; but this motion was also overruled. The evidence being heard, &c., the justice gave judgment for the plaintiffs. And the defendant appealed.

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v.
SMITH.

In the Circuit Court, he renewed his motion to dismiss; but his motion was again overruled. The cause was then submitted to the Court, who found for the plaintiffs. And having refused a new trial, rendered judgment, &c.

In support of the motion to dismiss, the appellant assumes two grounds—

1. The plaintiffs being non-residents, the justice should have required security for cost, at the commencement of the suit.

2. The cause of action is insufficient. In addition to the note and its assignment, there should have been filed a written statement, disclosing the names of the assignees of the note.

The statute says: "Justices shall require security for cost from plaintiffs living out of the county." 2 R. S. p. 460, § 55. It, however, does not say at what stage of the proceedings in a suit, the justice shall make such requirement; but § 75 of the same statute enacts that, "In all cases not in this act specially otherwise provided, proceedings before justices shall be governed by the practice," &c., "of Circuit Courts." *Id.*, p. 465.

The first ground assumed for the dismissal of the action, evidently involves a case not provided for in the act relative to proceedings in justices' Courts. Hence, for the mode of procedure in such a case, we must, as prescribed in the section last quoted, look to the practice of Circuit Courts. And that being done, it will at once be seen that the justice, in this instance, the plaintiffs having given the requisite security, committed no error in refusing to dismiss the suit, because the practice in the Circuit Court is, to allow a non-resident to give such security at any time during the pendency of the action, when ordered to do so by the Court. 2 R. S. pp. 127, 128, § 402.

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v.
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The second alleged ground for the dismissal, is equally untenable. In actions commenced before a justice, in favor of a firm, it is not essential that the statement of the cause of action, should set out the names of the persons composing the firm; it is enough if their names appear in the proceedings before the justice, as the plaintiffs who instituted the suit. *Stout v. Hicks*, 5 Blackf. 49. The motion, in the Circuit Court, to dismiss the action, was, in our opinion, properly overruled.

The record contains a bill of exceptions, whereby it appears that the plaintiffs, upon the trial, offered in evidence the note sued on, upon which there was this indorsement; "Pay *A. B. Smith & Co.*, or order." Signed "*Benjamin F. Jones.*" It also appeared that the defendant, at the proper time, objected to the admission of the evidence, and that the Court overruled the objection; but the ground of the objection does not appear. It follows, the ruling of the Court, thus made, is not properly before us.

The note, having the indorsement thereon, was all the evidence given in the cause. Hence, it is insisted that the finding is not sustained by sufficient evidence; because of the absence of proof that the plaintiffs were the persons who composed the firm of "*A. B. Smith & Co.*" This position is not well taken. In the record there is no plea verified by affidavit, whereby it is denied that the plaintiffs compose that firm. It was not, therefore, incumbent upon them to make such proof. *Abernathy v. Reeves*, 7 Ind. R. 306.—*Groves v. Train*, 11 *id.* 198.—*Hauser v. Hays*, *id.* 368.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

N. T. Hauser, for the appellant.

W. F. Pidgeon, for the appellees.

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1859.

WHITSEL v. LENNEN.

WHITSEL
v.
LENNEN.APPEAL from the *Hamilton* Circuit Court.

Per Curiam.—*Lennen* was the plaintiff below, and *Whitsel*, the defendant. The complaint charges, substantially, that on, &c., at, &c., a certain writ for the assessment of damages, was in the hands of *Jacob B. Locke*, the sheriff of *Hamilton* county, upon which the sheriff, as commanded by said writ, on the 26th of *March*, 1855, impaneled a jury and proceeded to trial, under said writ, in due form, &c.; that the plaintiff was duly sworn, on said trial, as a witness, and was then and there examined, and gave his evidence as a witness on the same trial. And that defendant contriving, &c., on, &c., at, &c., in a certain discourse, &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning said trial, and of and concerning the evidence so given by the plaintiff on said trial, these false, malicious, and defamatory words, to-wit: You, meaning the plaintiff, swore a damned lie; and I, meaning the defendant, can prove it, &c. Damages are laid at 5,000 dollars.

Tuesday,
December 20.

Defendant demurred to the complaint; but his demurrer was overruled; and thereupon he answered. Verdict for the plaintiff. New trial refused, and judgment rendered.

In support of the demurrer, it is insisted that the complaint is defective, because it does not allege that the evidence given by the plaintiff was material to the issue.

In *Wilson v. Harding*, 2 Blackf. 241, the Court say: "Where there has been a trial before a competent tribunal, it will be presumed that the testimony given on that trial was material. To charge a man with perjury, in reference to a trial where perjury might be committed, is actionable."

This is, no doubt, a correct exposition of the law, and when applied to the point under consideration, at once shows that the ground assumed in favor of the demurrer, is not well taken.

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The judgment is affirmed with 10 per cent. damages and costs.

CASTEEL
v.
HIDAY.

D. Moss and J. W. Evans, for the appellant.
G. H. Voss, for the appellee.

CASTEEL v. HIDAY.

A party may waive the reading of a summons by the officer, in making service of it; and if he does, understanding the nature and object of the writ, the service is good without reading.

Tuesday,
December 20.

APPEAL from the *Madison* Court of Common Pleas.

WORDEN, J.—*Casteel* sued *Hiday* on a note, and had judgment, by default, for 677 dollars, 65 cents.

A summons appears in the record, indorsed by the sheriff as follows, viz.: "I served this summons on *Charles Hiday* by reading to, and within his hearing, on," &c.

Afterwards, and within a year, *Hiday* filed his complaint to set aside the default and judgment.

A demurrer was sustained to the complaint, and no exception, but an amended complaint, was filed, with two paragraphs.

A demurrer was sustained to the first paragraph, but no exception was taken. The second paragraph alleged that the summons in the original cause was not served on him, *Hiday*, but that judgment was taken by default against him, without service of process.

Casteel moved to strike out this paragraph; but the motion was overruled, and exception taken.

Issue was then taken upon it. This issue was submitted to the Court for trial, and was found for *Hiday*.

Motion for a new trial overruled, and exception. The Court, upon this finding, set aside the original judgment, and such further proceedings were had as that final judg-

ment was rendered for the plaintiff, *Casteel*, for 594 dollars. He appeals, and assigns for errors the rulings by which his original judgment was set aside.

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CASTEEL
v.
HIDAY.

The sheriff's return to the summons appears to be sufficient on its face. We need not determine, in this case, whether the return of the sheriff was not conclusive as between the parties, or whether it could be contradicted except by suit against him for a false return, as the evidence, in our opinion, utterly failed to show its falsity. The sheriff, the only witness introduced, testified that he had the summons, and went to *Hiday*, and, for convenience, had the summons in his hand, but not opened, which *Hiday* saw, and informed him of the case and the object of the suit, which *Hiday* said he fully understood. The sheriff then asked him if he desired it to be read. *Hiday* replied "No." The sheriff then asked him if he should indorse on the summons "served by reading," to which *Hiday* replied, "You may do it; it will all be right." The sheriff then made the indorsement, according to his assent and authority.

These facts were equivalent to reading the summons to *Hiday*, and justified the sheriff in making the return in question. *Hiday* was informed of the case, and the object of the suit, which he said he fully understood. He expressly waived the formality of reading the summons, and authorized the return in question. He cannot now be permitted to say that the summons was not duly served.

Hiday assigns, by way of cross error, the ruling of the Court on the demurrer to his original complaint and the first paragraph of his amended complaint. These set up a payment on the note which had not been indorsed, although *Casteel* promised to make the proper indorsements. Perhaps the payments thus made, and not indorsed, could be recovered by suit against *Casteel*. *Vide McCampbell v. Arheart*, at the present term (1). As no exception was taken to the rulings on these demurrers, we have not examined their correctness.

The appellee also assigns for error a ruling made in the subsequent trial of the cause; but as these subsequent

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CLUGGISH
v.
ROGERS.

proceedings will have to be set aside, it is not material to inquire into the correctness of this latter ruling.

We are of opinion that, for the reasons before given, the order of the Court, in setting aside the judgment on the ground that process had not been duly served, was erroneous.

Per Curiam.—The judgment of the Court below, in setting aside the judgment rendered by default, and the proceedings in the premises subsequent thereto, are reversed with costs, and the cause remanded.

J. Davis, for the appellant.

J. W. Sansberry, for the appellee.

(1) *Ante*, 391.

CLUGGISH v. ROGERS.

The mayors of towns and cities have the jurisdiction, under the laws of the state, of justices of the peace.

Wednesday,
December 21.

APPEAL from the *Henry* Court of Common Pleas.

PERKINS, J.—*Rogers* sued *Cluggish* before the mayor of *Newcastle*, upon a breach of warranty upon a horse swop. He alleged that the horse he received was warranted sound, worth 100 dollars, &c., whereas he was sick, had fits, and died soon after he received him.

Cluggish answered, by way of counterclaim, that the horse he received from *Rogers*, in the trade, was warranted sound, young, worth 100 dollars, &c.; whereas he was little less than fifty years old, ring-boned, spavined, &c., and worth nothing. *Cluggish* also denied the jurisdiction of the mayor over the person of the defendant; but the mayor entertained jurisdiction, tried the cause, and gave judgment for *Cluggish*. *Rogers* appealed to the Common Pleas.

In that Court, *Rogers* waived his demurrer, so far as it applied to the answer to the jurisdiction of the mayor, by insisting upon it only as to another point, and let the case stand upon the issue as one of fact, upon the denial of the plea, which the statute put in for him, and the cause was tried upon the merits. *Rogers* obtained judgment for 50 dollars.

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PENCE
v.
ARMSTRONG.

The evidence is not upon the record.

We have no doubt, as a question of law, but that the mayor had jurisdiction. He had the jurisdiction of a justice of the peace. But, as the evidence is not upon the record, we should be compelled to presume in favor of the judgment below, that upon the proof, it was shown that the defendant lived within the jurisdictional limits of the mayor, whatever those limits might have been.

The instructions were all right. No error is shown in the record. There is nothing in the case.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

J. H. Mellett and *E. B. Martindale*, for the appellant.

W. Grose, for the appellee.

PENCE v. ARMSTRONG.

APPEAL from the *Madison* Court of Common Pleas. Wednesday,
December 21.

Per Curiam.—Suit upon an award. Answer, setting up an offset.

Armstrong called *Pence* as a witness to prove his, *Armstrong's*, account. *Pence*, then, without being called upon to do so, proceeded to testify as to his own account in offset. *Armstrong* then offered himself as a witness to the whole case, and was thus admitted, over the objection of *Pence*. He should have testified to the new matter only, the offset. The point is settled by *Thompson v. Shaefer*, 9 Ind. R. 500, and *Draggoo v. Draggoo*, 10 *id.* 95.

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The judgment is reversed with costs. Cause remanded,
&c.

WININGER
v.
THE STATE.

J. W. Sansberry, for the appellant.
J. Davis, for the appellee.

THE PERU AND INDIANAPOLIS RAILROAD COMPANY v.
HUGHES.

Wednesday,
December 21.

APPEAL from the *Tipton* Circuit Court.

Per Curiam.—This case is here upon the evidence.

If the evidence in the record is all that was given, we do not see how we can disturb the judgment below; but the record does not purport to contain all the evidence.

The judgment is affirmed with 10 per cent. damages and costs.

J. Green and *N. B. Taylor*, for the appellants.
J. A. Lewis, for the appellee.

WININGER and Others v. THE STATE.

Where an assault and battery is not the gravamen of, but merely an incident occurring at a riot, a final judgment in the prosecution for one of the offenses may not be a bar to a prosecution for the other.

Wednesday,
December 21.

APPEAL from the *Martin* Court of Common Pleas.

HANNA, J.—This was a prosecution for a riot. Trial by the Court; finding of guilty, and judgment, over a motion for a new trial.

The evidence is in the record, and, upon the part of the state, was sufficient to authorize the finding; but the witness, without objection, stated that the defendants had

each been fined three dollars, by a justice, for the same act, upon a prosecution for an assault and battery. It is further shown, by the bill of exceptions, that during the trial "it was admitted before the Court, by the prosecuting attorney, that all of the defendants had been legally tried for the same act, upon a charge of an assault and battery, before a justice of the peace, and had been fined the sum of three dollars each, and that said judgment had not been reversed," &c. The bill of exceptions further states that the Court found the defendants guilty, notwithstanding the admission, for the reason that the prosecution for the riot was not for the same offense, and that the defendants might be guilty of a riot and an assault and battery, by the same act. This is the only point in the case. There is thought to be a conflict in the decisions of some of the sister states upon this subject.

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WININGER
V.
THE STATE.

We think the true rule, in prosecutions for offenses of this character, is, that where the gravamen of the riot consists in the commission of an assault and battery, then, a conviction for that assault, &c., would be a bar to a prosecution for a riot; but where the commission of an assault and battery was merely incidental to the riot, then a conviction for the one would not bar a prosecution for the other; as in an instance where several should riotously attempt to tear down a house, and, in that attempt, the owner of the house, in the defense thereof, should be assaulted, &c. Here the purposed and main offense would be, the demolition of the house, but at the same time the parties might, in the perpetration of that offense, commit other unlawful acts for which a prosecution could be maintained, as well as for the riot.

The question would be, is the one act included in the other?

In the case at bar, although the Court below held it was not the same offense, we are informed it was all the same act, and the evidence shows the gravamen of the riot was the assault and battery. The judgment must, therefore, be reversed.

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Per Curiam.—The judgment is reversed. Cause remanded, &c.

BURTCH
v.
DENT.

A. I. Simpson, for the appellants.

J. E. McDonald, Attorney General, and *A. L. Roache*, for the state.

McNEER and Another v. DIPBOY.

Wednesday,
December 21.

APPEAL from the *Madison* Court of Common Pleas.

Per Curiam.—Suit on a note. Answer, among other things, a release by said plaintiffs in writing, &c., which is lost, &c. Reply in denial. Demurrer to the reply, on the ground that it was not sworn to. Demurrer overruled.

This presents the only point in the brief of the appellants. There was no error in the ruling of the Court upon the point made. *Magee v. Sanderson*, 10 Ind. R. 261.

The judgment is affirmed with 10 per cent. damages and costs.

M. S. Robinson, for the appellants.

J. W. Sansberry, for the appellee.

BURTCH v. DENT.

Credits wrongfully made upon a promissory note, may properly be obliterated.

Wednesday,
December 21.

APPEAL from the *Boone* Circuit Court.

Per Curiam.—Complaint by the appellee against the appellant, on a note made by the appellant to the appellee on the 14th of *August*, 1847, for 56 dollars.

Answer in denial, and payment in part.

Trial by the Court, finding and judgment for the plaintiff for 78 dollars, 95 cents, over a motion for a new trial.

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The only question raised is, whether certain indorsements on the note should have been allowed as credits thereon.

BURTON
v.
DENT.

The note was indorsed as follows:

"*February* 19, 1848, paid on the within note forty dollars."

"*January* 21, 1857, paid on the within note and interest thereof, twenty-nine dollars."

These indorsements, says the bill of exceptions, are almost entirely defaced and obliterated by a copious coat of ink of a different color from that with which the indorsements were written, also, by some strokes, made with a pen, across the credits, in the same colored ink as the obliterations, leaving the indorsements of payment readable through the obliterations. It appeared that one *James Miles*, as agent of the plaintiff, six or seven years before the trial, presented the note to the defendant, who then paid him 10 dollars thereon; that the defendant then took the note and entered upon it a credit or credits, including some book accounts, which he said he held against the plaintiff, for medical services, which nearly satisfied the note. *Miles* remonstrated, saying he did not wish the note credited with anything but the money he got; that he had no authority to receive anything but money on the note. The defendant said it was all right, and if not, he would make it right with the plaintiff. On returning the note and money to the plaintiff, she said the credits were not right. The witness does not know whether there were two credits indorsed on the note, or only one, and does not know who made the obliterations.

From the amount found by the Court, it would seem that the 10 dollars thus paid, was allowed the defendant, but the indorsements were disallowed, and we are not disposed to disturb the finding of the Court below. The credit or credits thus indorsed upon the note, by the defendant, were wholly unauthorized, and the plaintiff had a perfect right to obliterate them. A resort to such means

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TRITTIPO
v.
TALBOTT.

In reference to the second credit indorsed upon the note, it may be observed that it does not appear in whose handwriting it was, or when it was made, except from its date.

It is shown that when the notes were returned to the plaintiff, she said the credits were not right, and from all the evidence in the case, we cannot say the Court was wrong in finding, in effect, that both credits were made without authority of the plaintiff.

The judgment is affirmed with 10 per cent. damages and costs.

A. J. Boone, for the appellant.

TRITTIPO and Another v. TALBOTT and Others.

Wednesday,
December 21.

APPEAL from the *Hamilton* Court of Common Pleas.

Per Curiam.—In this case the only error assigned is, that the writ was made returnable on the second day of the term of the Court. There was no error in this. *Davis v. Pike*, at this term (1).

The judgment is affirmed with 5 per cent. damages and costs.

E. S. Stone and *W. W. Conner*, for the appellants.

D. Moss, *J. W. Evans*, *S. Yandes*, and *C. C. Hines*, for the appellees.

(1) *Ante*, 379.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
ASTON.

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CLEVELAND
v.
WORRELL.

APPEAL from the *Lawrence* Circuit Court.

Wednesday,
December 21.

Per Curiam.—Suit by the appellee against the company for killing stock of the plaintiff, by the cars, on the road, at a place where it was not fenced, but not adjoining land owned by the plaintiff.

The only question raised by the counsel for the appellant, in his brief, relates to the liability of the company, the plaintiff not being a proprietor or occupant of the land adjoining the road. It has been settled that the company is liable, although the plaintiff was not an occupant or proprietor of the adjoining lands. *The Indianapolis, &c., Railroad Co. v. Townsend*, 10 Ind. R. 38.

The judgment is affirmed with 10 per cent. damages and costs.

W. G. Cooper, for the appellants.

S. W. Short, for the appellee.

CLEVELAND and Another v. WORRELL, Administrator.

A reply, denying each and every allegation in all the paragraphs of an answer, is good.

If a note sued on is lost, and cannot be found on diligent search, its contents may be proved.

The loss, and personal diligence of the loser, may be shown by his affidavit.

APPEAL from the *Hendricks* Court of Common Pleas. Wednesday,
December 21.

DAVISON, J.—The appellee, who was the plaintiff, and administrator of the estate of *Michael McClain*, deceased, brought an action against *Ohio Cleveland* and *Layton Mills*, alleging that the defendants, on the 10th of September, 1856, by their promissory note of that date, promised to pay the plaintiff, at twelve months, 327 dollars, 17 cents,

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CLEVELAND
v.
WORRELL.

without relief, &c., which note the plaintiff has lost, and though he has made diligent search for the same, he has been unable to find it. It is averred that the note is due, and wholly unpaid, &c. Appended to the complaint there is, what is alleged to be a copy of the lost note, in these words:

"Twelve months after date, we, or either of us, promise to pay *William Worrell*, administrator of *Michael McClain*, deceased, 327 dollars, 17 cents, without any relief whatever from the appraisement laws. Dated this 10th of *September*, 1856.

Ohio Cleveland,
"*Layton Mills.*"

Attached to this copy, there is an affidavit of the plaintiff, alleging that "he held a note against *Ohio Cleveland* and *Layton Mills*, of which the above is a true copy: he further says that, on the 10th of *September*, 1857, the note, with his pocket-book, some money, and divers other notes, was either stolen from, or lost by, him, and that he has made diligent search and effort to recover the same, without success, and that no part of said note has been paid."

Defendants answered—

1. By a general denial.

2. That *Ohio Cleveland*, one of the defendants, on, &c., at, &c., and before the commencement of this suit, fully paid to the plaintiff, in money, the principal and interest due him on said supposed note, and then and there received the same from him and destroyed it, &c.

The reply to the answer is in this form:

"Plaintiff, for a reply to the several paragraphs of the answer, denies each and every allegation thereof."

Defendants demurred to the reply, but their demurrer was overruled. The issues were then submitted to the Court for trial. Finding for the plaintiff. New trial refused and judgment.

The reply to the answer is said to be defective, because it is applied to all the paragraphs, when there should have been a separate reply to each. There is nothing in this objection. The general denial authorized by the code, is, in this respect, similar to the general issue at common law, it con-

troverts all the several defenses set up in the answer. The reply, in the form adopted in this case, is obviously sufficient. Van Santv. Pl. 405, 406. In reference to the contents of the lost note, two witnesses were produced. One of them testified that "he was clerk of sale of the personal property of the estate of said decedent; that he saw a note made by the defendants to *Worrell*, and had the note in his possession three or four days after the sale of the property. The note was for over 300 dollars." Witness having referred to the bill of sale of said property, stated the exact amount of the note to be 327 dollars, 17½ cents. The notes taken at the sale, waived the appraisement laws; they were given 10th of *September*, 1856, and due twelve months after date.

The other witness, upon his examination, stated that he read the amount of the sale bill, which was 327 dollars, 17½ cents, to the defendant, *Cleveland*, who inspected the items and said he supposed it was all right, and that he had given his note for the amount, whatever it was, to *Worrell*, the plaintiff, waiving the appraisement laws. This was all the evidence given in the cause.

The testimony of both witnesses was admitted over the defendants' objection; but as, in the reasons for a new trial or in the assignment of errors, no point is made relative to the admission of this testimony, the ruling of the Court, in admitting it, will not be noticed.

As we have seen, the loss of a note similar to the one described in the complaint, was proved by the plaintiff's affidavit; this was sufficient to allow proof of its existence, and of its contents. The affidavit, in our opinion, sufficiently shows that a reasonably diligent attempt had been made to recover the lost note, without success. 2 Phil. Ev., 4 Am. ed., 546. And the testimony of the first witness fully proves, not only the existence of the note sued on, against both defendants, but its contents, as alleged in the complaint. At all events, the Court, sitting as a jury, has passed upon the evidence, and we are not, in view of the whole case, inclined to disturb its conclusions.

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Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

MARKLE
v.
WRIGHT.

C. C. Nave and *J. Witherow*, for the appellants.
H. C. Newcomb, *J. S. Tarkington*, and *L. M. Campbell*,
for the appellee.

MARKLE v. WRIGHT.

A suit for an injunction, is not the remedy for obtaining possession of an office to which a person has been elected, and from which he is illegally excluded by a usurper.

Wednesday,
December 21.

APPEAL from an order granting an injunction, made in vacation of the *Jasper* Circuit Court.

WORDEN, J.—*Wright* filed his complaint in the *Jasper* Circuit Court, alleging, in substance, that at the *October* election, for the year 1856, he was duly elected to the office of treasurer of said county, received his commission, took the oath of office, and gave bond as required by law; that *Markle* was his predecessor, whose constitutional term expired on the 12th of *August*, 1857; that on the 13th of *August* of that year, he demanded of *Markle*, the books, papers, &c., belonging to the office; but that *Markle* refused to surrender them, &c. Prayer for an order restraining and enjoining the defendant from exercising the functions of the office, and requiring him to surrender to the plaintiff, the appurtenances belonging to the office.

On application to the judge of the Court in vacation, the defendant appearing, an injunction was granted, requiring the defendant to forthwith surrender to the plaintiff, the appurtenances of the office, and to refrain from discharging, or pretending to discharge, any of the duties thereof, &c.

The defendant excepted to the order thus made, and from it appeals to this Court.

The question involved in the case, so far as the rights of the parties are concerned, is settled in favor of the plaintiff, *Wright*, by the case of *Howard v. The State*, 10 Ind. R. 99, and nothing further need be said in that respect. But the plaintiff has mistaken his remedy. We are of opinion that art. 8, 2 R. S. p. 59, does not give a remedy in such case, by injunction, and consequently that the order must be reversed.

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CLEVELAND
v.
STANLEY.

An express remedy is provided by way of "information" (2 R. S. p. 198), and perhaps there may be some other remedies, but the above-cited statute, on the subject of injunctions and restraining orders, cannot be construed to authorize the Court, or judge in vacation, to make an order, by way of injunction, requiring the incumbent of an office, although his term has expired, and his successor has been duly elected and qualified, to transfer and deliver to his successor, the appurtenances of the office.

Per Curiam.—The order made below is reversed with costs. Cause remanded, &c.

S. A. Huff, Z. Baird, and J. M. LaRue, for the appellant.

R. C. and J. Gregory, R. H. Milroy, and L. A. Cole, for the appellee.

CLEVELAND v. STANLEY.

The defendant cannot, as of course, and without cause shown, claim a continuance, because the plaintiff has failed to answer interrogatories.

APPEAL from the *Hendricks* Court of Common Pleas. *Thursday, December 22.*

WORDEN, J.—Suit by *Stanley* against *Cleveland* upon a note. Answer, payment. Replication.

The defendant filed interrogatories, to be answered by the plaintiff, who was ruled to answer them; but no time was fixed within which they were to be answered. There-

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CLEVELAND
v.
STANLEY.

upon *Stanley's* attorney filed an affidavit that *Stanley* was not present, nor did the affiant know where he might be found, nor the place of his residence, wherefore the interrogatories could not be answered without delay, and asked that the rule might be discharged, unless the defendant should comply with the statute, &c.

The defendant offered to prove that *Stanley* lived within four miles of the court-house; but the Court refused to hear the evidence, set aside the rule to answer the interrogatories, and the cause proceeded to trial, resulting in a finding and judgment for the plaintiff.

It is objected that no replication to the answer had been filed at the time the rule to answer the interrogatories was set aside; but we cannot perceive any error in this. A replication was filed before the cause was tried.

It is also objected that the affidavit filed was not sworn to; but it purports to be an affidavit, and was so treated in the Court below, although it does not appear to have the jurat of the clerk. It may have been sworn to in open Court; and if so, it needed no jurat as evidence that it had been duly sworn to by the affiant.

We see no substantial error in the case. The plaintiff, under the circumstances, was entitled to a trial of the cause, and the formal order setting aside the rule to answer the interrogatories was immaterial. The cause might have legally proceeded to trial without setting aside the rule. The plaintiff would have been entitled to a trial, without the affidavit filed by his attorney, and the fact offered to be shown by the defendant, if proven, could not alter the case. The plaintiff was either present or absent, and, in either event, was entitled to go on with the trial. If present, because no time had been fixed within which he was required to answer the interrogatories, and no steps whatever had been taken to compel an answer. *Rice v. Derby*, 7 Ind. R. 649. If absent, because no affidavit was filed on the part of the defendant, as required by the act of 1855. Acts of 1855, p. 59. A temporary delay does not appear to have been asked for, and, by the statute referred to, the filing of interrogatories does not work a

continuance of a cause without an affidavit of merits. Perhaps, under the statute, in the absence of a party, the Courts might delay a cause temporarily for an answer to interrogatories, without affidavit; but, as before remarked, no such temporary delay was asked, nor does it appear that it could have been granted without occasioning a continuance. The proceedings were had on the ninth day of the term, and how much longer the Court continued in session, does not appear.

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The case of *Cleveland v. Hughes*, 12 Ind. R. 512, is very much like the present, and fully sustains the ruling here.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

C. C. Nave and *J. Witherow*, for the appellant.

L. M. Campbell, *H. C. Newcomb*, and *J. S. Tarkington*, for the appellee.

VORE and Others v. HURST.

Where a promissory note is indorsed by the payee, whose name is followed upon the back of the note by other names in blank, parol evidence will not be permitted to vary the legal effect of the indorsements thus appearing upon the note.

APPEAL from the *Wayne* Circuit Court.

Thursday,
December 22.

WORDEN, J.—This was an action by the appellee against the appellants.

The complaint contained several paragraphs, but the recovery below was had only upon the fifth, which is as follows, viz.:

“For further and fifth count, the said plaintiff says that on the 10th of *March*, 1853, the said defendants, *Caleb B. Smith*, *S. Meredith*, *Jacob Vore*, *Pleasant Johnson*, *Charles H. Raymond*, *John Crum*, and *Robert Murphy*, executed their promissory note to *Thomas Tyner*, whereby they promised to pay him, six months after date, 1,000 dollars, for

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value received, a copy of the note being herewith filed, which note the said *Tyner* then and there indorsed to the plaintiff, and he avers that said *Meredith*, *Vore*, *Johnson*, *Raymond*, *Crum*, and *Murphy* placed their names on the back of said note, but that it was not their intention to assume any different liability from that of *Smith*, and that the purpose of their indorsement was to give *Smith* credit with the plaintiff, to whom the note was to be indorsed; that the note was given for borrowed money—money loaned to all the defendants, and at the request of all the defendants; but they have wholly failed to pay,” &c.

The note set out is as follows, viz.:

“ *Cambridge, March 10, 1853.*

“Six months after date, I promise to pay to the order of *Thomas Tyner*, one thousand dollars, for value received.

“ *Caleb B. Smith.*”

The note was indorsed: “*Thomas Tyner, S. Meredith, Jacob Vore, Pleasant Johnson, Charles H. Raymond, John Crum, Robert Murphy.*”

Demurrer overruled, and exception taken.

Answer in denial.

Trial by jury; verdict and judgment for the plaintiff, a new trial being refused.

Smith and *Meredith* do not appear to have been parties to the suit. The verdict and judgment were rendered against *Vore*, *Johnson*, *Raymond*, *Crum*, and *Murphy*, and not against *Tyner*.

On the trial, it appeared that the president and directors of the *Cincinnati, Cambridge, and Chicago Short Line Railroad Company* wished to borrow money to make a survey of their road. *Hurst* proposed to lend the money, if the directors would bind themselves individually for its payment. The money was lent, and used for the purposes of the road, and the note in question given, the parties to it being the officers of the company. *Smith* was president, *Tyner*, to whom the money was paid, was secretary or treasurer, and the others directors. The note appears to have been drawn up and signed by *Smith*, as maker, and indorsed by *Tyner*, the payee, and the other parties, all

as one entire transaction, and delivered to *Hurst*. There was evidence from which it might, perhaps, be inferred that all the parties whose names are upon the note intended to bind themselves equally for its payment. The question is presented in the record, under various forms, whether the parties placing their names upon the back of the note, are liable as indorsers only, or whether they can be shown, by parol proof, to be liable, primarily, as makers. If liable only as indorsers, there can be no recovery in the case, as no diligence is shown to collect of the maker, and no excuse for the want of such diligence. If the appellants are liable, in this case, it is on the ground that they are to be considered, under the circumstances, as makers of the note.

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The note itself does not show any liability against the appellants as makers. Their contract is that of indorsers, and the question arises whether parol evidence is admissible to change the character of the liability as shown by the note itself, and render the indorsers liable in the capacity of makers. As a general proposition, it is not disputed that parol evidence is inadmissible to vary the legal effect of a written instrument. Thus, in *Wilson v. Black*, 6 Blackf. 510, it was held that the legal effect of a blank indorsement of a promissory note, transferred in a regular course of business, could not be controlled by parol evidence that the indorsement was without recourse.

But it is insisted by the appellee "that where parties write their names upon a note at the time it is executed, whether upon the face or back, it is competent to show, by parol evidence, what liability the parties really intended to assume, and hold them responsible accordingly, without reference to the position of their names upon the note."

In the case of *Wells v. Jackson*, 6 Blackf. 40, the Court, after examining the *Massachusetts* and *New York* cases, say: "The deduction which we draw from these authorities is, that the blank indorsement of unnegotiable paper, made at the date of the contract, and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser liable, on the original contract, as a

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surety; and that a similar unexplained indorsement of negotiable paper renders the indorser liable only as an indorser, with the ordinary rights and privileges incident to that character. But that, in either case, the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind."

The doctrine of this case was followed in *Early v. Foster*, 7 Blackf. 35; *Harris v. Pierce*, 6 Ind. R. 162; and *Cecil v. Mix*, *id.* 478.

The doctrine thus established may, perhaps, be deemed the settled law of this state, but it seems to us to be wholly inapplicable to the case at bar. The indorsement by the payee of a note not negotiable, could not have the effect of transferring the title to the note; and, because it could not thus operate as a legal indorsement, it might, in order to give the transaction any binding obligation, be construed as equivalent to a promise to pay the note, and render the indorser liable thereon as maker. Such was the case of *Josselyn v. Ames*, 3 Mass. R. 274, cited in *Wells v. Jackson*, *supra*.

Questions touching the liabilities of parties indorsing their names in blank upon the back of promissory notes, have frequently arisen in *New York* and *Massachusetts*, as well as in other states, since the cases referred to in *Wells v. Jackson*, *supra*. The cases are mostly collected in the notes to § 473, *et seq.*, of Story on Prom. Notes. They are reviewed in *Ellis v. Brown*, 6 Barb. 282. *Vide* 10 *id.* 402; *Seabury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 3 *id.* 233; S. C., 7 *id.* 416; *Spies v. Gilmore*, 1 Comst. 321; *Brewster v. Silence*, 4 Seld. 207; *Castle v. Candee*, 16 Conn. R. 223; *Taylor v. McCune*, 1 Jones (Penn.), 460; *Crozer v. Chambers*, 1 Spen. (N. J.) 256; *Fear v. Dunlap*, 1 Green (Iowa), 331; *Jennings v. Thomas*, 13 S. and M. (Miss.) 617; *The Union Bank v. Willis*, 8 Met. 504.

The later cases in *New York* seem to overturn their former doctrine; and it would now seem that, in that state, a party indorsing his name in blank upon the back

of a promissory note, can be held liable only as an indorser.

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In *Spies v. Gilmore, supra*, BRONSON, J., said: "There are a few cases in the books which hold, in effect, that a written contract of one kind may be turned into a contract of a different kind by parol proof concerning the intention of the parties; that the indorser of a promissory note may, under certain circumstances, be charged as maker or guarantor; and that the guarantor of a promissory note may sometimes be charged as maker or indorser. Although these cases stand upon no principle, it has been a work of some time and difficulty to get rid of them. The Court of Errors was at first equally divided on the question; but, after a second argument, the Court decided, by a pretty strong vote, to uphold contracts as they had been made by the parties, instead of making new contracts for them."

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The decisions, however, are not uniform on this question; some holding that such indorsement is open to parol proof, to show that it was intended to create the liability of a guarantor or maker, and others holding the reverse. In this connection, the remarks of WAITE, J., in *Castle v. Candee, supra*, are not inappropriate. He observes: "It is greatly to be regretted that a contract of this mercantile character, upon an instrument designed upon its face to circulate in the community, should receive so many different constructions; that its meaning should depend upon whether it was made on this or that side of a state line; that it should be necessary for a person, before he could know what contract is contained in the indorsement, to inquire whether it was made in *Massachusetts, New York, or Connecticut*, and if in the latter state, whether there are any witnesses by which a contract may be proved different from what the law would otherwise imply. And, perhaps, it would have been better had our Courts held, that such indorsements, like those made by the payee of a note, have a fixed legal character, not depending for their meaning upon the vague and uncertain recollection of witnesses, and circumstances often imperfectly presented on the trial;

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that every one, upon looking at such indorsement, might say at once what contract it contained."

But whatever diversity there may be in the cases, in respect to the question, whether parol evidence is admissible to show the kind of liability intended to be assumed by such blank indorsement, it is believed that, in all the cases where the party thus indorsing has been held liable as maker, the note was either not negotiable, or the indorsement was made before the note was negotiated, and the contract or liability thus assumed, inured to the benefit of the payee. This view is sustained by what is said in *Dean v. Hall*, 17 Wend. 214, which was an action on a note made by *Coleman* to *Howard* or bearer, and indorsed on the back in blank by *Hall*. COWEN, J., after reviewing the cases, says: "Such are the cases relied upon to sustain this declaration. I think the utmost they establish, is, that where the defendant is privy to the consideration, and indorses a note not negotiable, or, at most, one payable to order, or to the plaintiff or bearer, and not negotiated, the declaration may then charge the defendant, as maker. This is the extent of *Herrick v. Carman*, and *Nelson v. Dubois*, which go farthest. None of the cases mean that, whatever may be the consideration, if the defendant stand in the ordinary relation of a commercial indorser, he is not to be treated as such."

In the cases decided in this Court, the contracts of indorsement inured to the payee.

We find no case holding that, where a blank indorsement thus made was concurrent with the indorsement of the note by the payee, the parties thus indorsing with him could be held liable as makers. The reason for holding that an indorsement in blank, of a note not negotiable, or a negotiable note not negotiated, may be shown by parol testimony to have been intended to create the liability of a maker, is sufficiently obvious. As before remarked, a contract of indorsement strictly, cannot be made upon a note not negotiable, even by the payee.

When a name is placed in blank upon the back of a negotiable note, by a third party, while it is in the hands of

the payee, thereby creating a liability in favor of the payee, there is no indorsement strictly, because the note, although negotiable, has not been negotiated. Now, when an indorsement is thus made in blank upon a negotiable note, inuring to the benefit of the payee, unconnected with any transfer of the note, the liability intended to be created by the indorsement does not conclusively appear, unless, indeed, it be held, in accordance with the later decision in *New York*, to create the liability of an indorser, and nothing else. But in accordance with the decisions of this Court, heretofore made, it not being conclusively presumed that such liability only was intended to be created, the contract may be said to be ambiguous. It is taken for granted that some kind of liability was intended. If the liability intended were written out upon the note, that, of course, would govern. But it not being written out, thereby leaving it uncertain whether the liability of an indorser, guarantor, or maker, was intended, the law permits parol proof to show what was the real intention of the parties, and will hold them responsible accordingly. *Vide Jennings v. Thomas, supra.*

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V.
HURST.

But in the case at bar, there is no ambiguity to explain. The note is indorsed by the payee and the appellants, whereby it is legally transferred to the appellee, and the liability of indorsers, and nothing more, attaches to those thus making the indorsement. Although these indorsements were in blank, yet the legal effect is as well known and understood as if it had been written out, and can no more be explained by parol evidence than if it had been thus written.

In Story on Prom. Notes, § 134, it is laid down that, "If a bill be negotiable, and the payee should indorse it in blank, the indorsement will not inure as a guaranty, but simply as the contract of an indorser. The like rule will prevail if the indorsement is made by any other person than the payee, for he may well be deemed as intending to stand in the character of a second indorser, after the payee, although he was privy to the original consideration between

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the drawer and the payee, and indorsed it for the accommodation of the drawer."

The evidence in the case fails to establish a material allegation in the complaint, viz., that *Smith* and the appellants "executed their promissory note to *Tyner*." Had the note been made by *Smith*, and indorsed in blank by the appellants before indorsement by *Tyner*, and then had *Tyner* indorsed it to *Hurst*, the latter would, of course, have been entitled to all the rights of *Tyner*, and, according to the adjudications, would have been entitled to show, by parol, that the appellants intended to make themselves liable to *Tyner*, as makers, which proof would, perhaps, have sustained the allegation in the complaint. The case would then have fallen within *Wells v. Jackson*, and the cases following it in this Court.

The evidence, instead of showing an indorsement by the appellants, by which a liability was created against them in favor of *Tyner*, simply shows an indorsement with him of the note, and the law fixes the character of the liability thus created.

Tyner, the payee, together with the appellants, indorsed the note. In no sense can *Tyner* be said to be a maker of the note, being the payee thereof. It is difficult to perceive how the appellants, by their indorsement, could have created a greater liability thereby, than that created by *Tyner* against himself. The language of the Court in *Seabury v. Hungerford*, *supra*, is applicable here. The Courts "never make contracts for parties, nor substitute one contract for another. This was, in legal effect, regular mercantile paper upon which the appellants contracted the obligation of indorsers, and by that obligation, and no other, are they bound." The case of *Howe v. Merrill*, 5 Cush. 80, is in point, and pretty conclusively shows that the appellants are not liable as makers of the note in question. The suit was upon a note made by *Stevens Merrill* to *Prescott*, and by *Prescott* indorsed in blank, and afterwards indorsed in blank by the defendant, *Arthur Merrill*. The Court say: "This is an attempt to charge a second indorser as a

guarantor. We are of opinion that the action will not lie for several reasons—1. It is no more competent to alter and vary the legal effect of a written instrument by parol evidence, than to alter and change its express terms. On the face of the paper, the defendant is liable as second indorser, with the rights and privileges of that relation, and subject only to the obligations which it imposes. One of the latter is, that the indorser is liable only on a condition, which, in this case, did not happen, of a dishonor of the note by the promisor, and seasonable notice thereof to the indorser; but the attempt is, to charge the indorser absolutely as a promisor or guarantor. All the cases from *Hunt v. Adams*, 5 Mass. R. 358, down, it is believed, in which one has been so charged, are the cases where the name appears on the note, but not as a regular indorser.”

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VORNS
V.
HURST.

The note in the case at bar, it may be observed, is not placed upon the footing of bills of exchange, not being payable “in a bank in this state,” but it is, nevertheless, negotiable, and the indorsers thereof can only be held liable by the exercise of due diligence on the part of the holder to collect it of the maker, or by averring and proving some valid excuse for the failure to exercise such diligence.

We are of opinion that, upon the case made, the motion for a new trial should have prevailed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, J. P. Siddall, J. B. Julian, N. H. Johnson, and G. W. Julian, for the appellants.

O. P. Morton, M. Wilson, and C. H. Burchenal, for the appellee.

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COLLIER and Another v. THE STATE.

HARRIS
v.
MAKEPEACE.

Thursday,
December 22.

APPEAL from the *Putnam* Court of Common Pleas.

Per Curiam.—Suit by the state against the appellants on a note. Judgment by default.

Errors are assigned relating to the sufficiency of the complaint. No steps were taken in the Court below to set aside the judgment, or otherwise to remedy the error, if any was committed, which must be done, as has been decided in several cases, before bringing the case to this Court.

The appeal is dismissed with costs.

A. Daggy, for the appellants.

D. Williamson, for the state.

HARRIS v. MAKEPEACE.

Where a mortgage is given to secure the payment of a note, and the mortgage contains a waiver of the appraisement law, and the note does not, a judgment of foreclosure and sale without appraisement, in a suit upon the mortgage, is valid, so far, at least, as to the premises embraced in the mortgage. The statute requiring the Court to ascertain whether mortgaged premises can be sold in parcels, applies only where there are installments secured by the mortgage yet to become due.

Thursday,
December 22.

APPEAL from the *Madison* Court of Common Pleas.

WORDEN, J.—Complaint by *Makepeace* against *Harris*, to foreclose a mortgage made by *Harris* to one *Vasbinder*, to secure the payment of two notes for 500 dollars each, one payable *January* 1, 1857, and the other *January* 1, 1858. The latter note and the mortgage were assigned by *Vasbinder* to the plaintiff. The note thus assigned did not waive the appraisement laws, but the mortgage contains a covenant or stipulation, on the part of the mortgagor,

whereby he "expressly agrees to pay the sums of money above secured, without relief from valuation laws." Nov. Term,
1859.

There was an ordinary judgment of foreclosure, directing so much of the mortgaged premises as might be necessary, to be sold without appraisement, to pay the sum due. HARRIS
V.
MAKESPACE.

Several errors are assigned, all of which will be noticed in their order.

1. It is claimed that the Court erred in overruling a motion made by the defendant to strike out of the complaint that portion which asked for a judgment waiving appraisement laws. This motion was correctly overruled, as the mortgage fully authorized a judgment of foreclosure without appraisement.

2. The Court erred in foreclosing the mortgage, without finding whether the mortgaged premises were susceptible of division. There is nothing in this objection. There were no installments yet to become due, the note embraced in the suit being the one last due, the one previously due, for aught that appears, having been paid, and the judgment only directed enough of the property to be sold to satisfy the note in suit. The statute requiring the Court to ascertain whether the property can be sold in parcels, is only applicable to cases where there are installments yet to become due. 2 R. S. p. 176, § 637, *et seq.*

3 and 4. The third and fourth assignments of error are substantially alike, being that the Court erred in rendering judgment waiving appraisement. The mortgage, we have seen, fully authorizes such judgment, so far as the mortgaged premises are concerned. The judgment rendered amounts to nothing more than a strict foreclosure, or rather a judgment that the mortgaged premises be sold for the payment of the debt. There is no order that upon the premises failing to sell for enough to pay the debt, the deficiency be made out of other property of the defendant. If the plaintiff would proceed against other property, after having exhausted the mortgaged premises, he must have procured such a direction in the order of sale. *Vide* § 634 of statute above cited. This the plaintiff has not done,

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1859.

RICE
v.
RICE.

and the judgment only authorizes him to proceed against the premises mortgaged; hence, we are not called upon to determine whether the stipulation in the mortgage, above noticed, would authorize the sale of property, other than that mortgaged, to be sold without appraisement. Perhaps an order for the sale of other property might be made by the Court, after the return of an execution showing the sale of the mortgaged premises leaving a deficiency; but if an order could be then made, then would be the time to determine whether the property should be sold without appraisement. It would seem that the notes and mortgage should be construed as constituting an entire contract, and that the stipulation in the mortgage would authorize the sale of any property, for the payment of the notes, without appraisement; but on this point we make no decision.

5. The fifth and last error assigned is too general, and amounts to nothing, being that the judgment is contrary to the laws of the land.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

M. S. Robinson, for the appellant.

J. Davis, for the appellee.

RICE and Others v. RICE.

Where a judgment upon a divorce was rendered in the Circuit Court for 200 dollars alimony, in addition to one-third of the real estate of the defendant, and on appeal by the defendant to the Supreme Court, the judgment was modified to 3,200 dollars in money, instead of 200 dollars in money and one-third of the real estate, it was *held*, in a suit upon the appeal bond, that the bond was a security for the 200 dollars in money only, of the judgment in the Circuit Court.

Thursday,
December 22.

APPEAL from the *Cass* Circuit Court.

WORDEN, J.—This was a suit by the appellee against the appellants, upon the appeal bond executed by the ap-

pellants for the purpose of appealing the case of *Rice v. Rice*, reported in 6 Ind. R. 100, to the Supreme Court. The bond was in the penal sum of 600 dollars, with a condition, in the ordinary form, that the appellants therein should "abide by and pay the judgment and all costs which might be rendered or affirmed against him in the Supreme Court."

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1859.

Rice
v.
Rice.

Trial by the Court; finding and judgment for the plaintiff for 492 dollars, 68 cents.

A motion for a new trial was made on the ground that the amount found by the Court was "excessive," which was overruled, and this raises the principal question in the case.

It will be seen, by reference to the case of *Rice v. Rice*, *supra*, that the judgment in the case below was that the plaintiff therein should recover 200 dollars as alimony, and have one-third of her husband's real estate set off to her. The Supreme Court affirmed the judgment as to the 200 dollars, and reversed that part of it setting off to the plaintiff one-third of the real estate, and directed that the judgment be so modified as to give the plaintiff, in lieu of one-third of the real estate, and in addition to the 200 dollars, 3,000 dollars, one-third of the estimated value of the real estate, deducting incumbrances. The judgment was accordingly modified in the Court below.

The question arises whether the obligors, in the appeal bond, can be held liable for any part of the 3,000 dollars given in lieu of one-third of the real estate. We are of opinion that they cannot be so held liable. The judgment for the 200 dollars was affirmed, and for that they are liable, but no judgment for the 3,000 dollars was either affirmed or rendered by the Supreme Court. The Court below was directed to so modify the judgment as to give the plaintiff 3,000 dollars, instead of one-third of the real estate. This was not affirming a judgment for the 3,000 dollars, for no such judgment had been rendered below; nor was it a rendering of judgment for that amount, as the Court below was directed to so render the judgment.

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1859.

DAVIS
v.
SMITH.

The construction that would hold the obligors liable for the 3,000 dollars, would make their liability greater than if the judgment had been entirely affirmed. The judgment in respect to the real estate, was simply that it be set off to her, &c. Had this judgment been affirmed, it is difficult to perceive how the obligors could have been liable on the bond, either for the land or its value.

It appeared on the trial that 50 dollars had been paid on the judgment, also the costs of the suit, except 5 dollars, 76 cents. It is evident that the judgment herein was for considerably too much, and the motion for a new trial should have prevailed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Chamberlin, for the appellants.

D. D. Pratt, for the appellee.

DAVIS and Another v. SMITH.

Thursday,
December 22.

APPEAL from the *Hamilton* Court of Common Pleas.

Per Curiam.—Suit by the appellee against the appellants on a note. Judgment by default.

Several errors are assigned, but no motion was made, or steps taken in the Court below to correct the alleged errors. This we have decided in several cases must be done before bringing the case here.

The appeal is dismissed with costs.

E. S. Stone and *W. W. Conner*, for the appellants.

D. Moss and *J. W. Evans*, for the appellee.

BOSLEY v. McALLISTER.

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1859.THE STATE
v.
STOGDEL.Thursday,
December 22.APPEAL from the *Crawford* Court of Common Pleas.*Per Curiam*.—Suit by *Bosley* against *McAllister* on a note.

Answer, that the note was executed on the *Sabbath*, and the consideration of the note, being the difference in exchange of property, wholly arose on the day of its execution; wherefore, the note is void.

Demurrer to the answer overruled, and judgment for the defendant.

The ruling on the demurrer is the only error complained of. It has several times been decided by this Court that a promissory note made on the *Sabbath* is void. No subsequent ratification was shown here, as was the case in *Banks v. Wertz*, at the present term of this Court (1).

The judgment below was right, and must be affirmed.

The judgment is affirmed with costs.

A. J. Simpson, for the appellant.

(1) *Ante*, 203.

THE STATE v. STOGDEL.

13 565
Case 2
157 239APPEAL from the *Howard* Circuit Court.Thursday,
December 22.

Per Curiam.—Indictment against the defendant for seduction. The indictment was quashed on motion of the defendant, and the state excepted.

The indictment seems to be sufficiently formal, and states, in substance, that the defendant, on, &c., at, &c., had illicit carnal intercourse with one *Mary Deeter*, a female of good repute for chastity, and under the age of twenty-one years, under a promise of marriage made by the defendant to said *Mary*. The indictment is too long,

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 Lone v. THE STATE. and contains too much verbiage and tautology, to justify its insertion in this opinion; but it contains, in substance, a charge of the crime of seduction, as defined in § 15, 2 R. S. p. 401.

No objection has been pointed out to us, and we think there is none, which would authorize the quashing of the indictment.

The judgment is reversed with costs. Cause remanded, &c.

D. Nation, for the state.

C. D. Murray, for the appellee.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
 BISHOP.

Thursday,
 December 22.

APPEAL from the *Floyd* Circuit Court.

Per Curiam.—Suit by the appellee against the company, for killing a cow. Recovery.

The question involved in this case, is the same as that in the same company v. *Aston*, at the present term (1).

The judgment is affirmed with 10 per cent. damages and costs.

W. G. Cooper, for the appellants.

(1) *Ante*, 545.

LONG v. THE STATE.

In an information or indictment for gaming, the amount or value of the article lost or won, should be set forth with certainty, in order, among other things, that it may appear what amount of fine may be assessed, under the

statute, that fact being necessary to enable the Court to determine what tribunal has jurisdiction of the offense.

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LONG
V.
THE STATE.

APPEAL from the *Howard* Court of Common Pleas.

WORDEN, J.—Information for gaming. Motion to quash overruled, and exception. Trial, conviction, and judgment.

Thursday,
December 22.

The information charges that the defendant “did win of and from *John Hass*, *George Pearson*, and others unknown, the sum of twenty-five cents each, by playing at and upon a game of cards,” &c.

The prosecution is predicated upon the act of 1857 (Acts of 1857, p. 97), by which the punishment is fixed at a fine of not less than the value, nor more than twice the value of the article lost or won.

By the revised code (2 R. S. p. 497, § 3), justices of the peace have “exclusive, original jurisdiction in all cases where the fine assessed cannot exceed three dollars.”

The sums won from *Hass* and *Pearson* are not sufficient in amount to warrant a fine of more than a dollar, hence the Common Pleas had no jurisdiction, unless the charge of winning the same amount from “others unknown,” is sufficient to aid the defect. This, we think, is not the case. The defendant might have won the same amount from each of two, three, or even four others, without subjecting himself to a fine which should exceed three dollars.

The amount lost or won should be set forth with certainty, in order that the amount of the fine may be determined, in accordance with the statute. Here there is no certainty, except as to the sums won from *Hass* and *Pearson*, which, we have seen, was not sufficient to confer jurisdiction.

The information is defective, and the motion to quash should have prevailed.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Green and *T. J. Harrison*, for the appellant.

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1859.

CUTCHEN and Another v. COLEMAN.

CUTCHEN
v.
COLEMAN.

Conwell v. Pumphrey, 9 Ind. R. 135, adhered to.

Under the code, judgment, in cases *ex contractu*, may be rendered against some, and for other of the defendants, according to the old chancery practice.

Thursday,
December 22.

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—Action by *Coleman* against the appellants, on a note executed by the appellants to one *Robinson*, and by him indorsed to the plaintiff, *Coleman*.

No process appears to have been served upon *John B. Mc Cutchen*, nor did he appear to the action.

John Mc Cutchen appeared and answered, setting up as a defense, usury in the assignment of the note by *Robinson* to *Coleman*. Demurrer sustained to the answer, and exception.

There was final judgment against both defendants.

There are two errors assigned:

1. In sustaining the demurrer; and
2. In rendering judgment against *John B.* without appearance or service of process upon him.

The first question thus raised, is settled against the appellants, by the case of *Conwell v. Pumphrey*, 9 Ind. R. 135. In that case the Court say: "The contract of assignment is in no way connected with the consideration of the note; and though such contract may be tainted with usury, still it only affects the promise of the assignor. So far as the assignment operates as a transfer of the note to the assignee, it is neither void nor voidable."

But we are asked to review the case above mentioned; and some *English* cases are cited tending to establish a different doctrine. We are inclined, however, to adhere to the doctrine thus established in our own Court, as, in our opinion, a party in no way affected by an usurious contract, and an entire stranger to it, should not be permitted to take advantage of usury between other parties, in order to avoid a contract legal and valid, entered into by himself. Moreover, it has been held that "Whenever the note, in its inception, is a real transaction, so that the payee or

18	568
142	487
143	702

promisee may, at maturity, maintain a suit upon it, the transfer by indorsement or discount, though beyond the legal rate of interest, shall be regarded a sale of the note, and a valid transaction." *The State Bank v. Coquillard*, 6 Ind. R. 232.

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1859.

THE STATE
v.
ORVIS.

The demurrer was correctly sustained.

An error was committed, however, perhaps inadvertently, in taking judgment against both defendants, without process served, or appearance, as to *John B. Mc Cutchen*. But this, under our present practice, will not require a reversal of the judgment. It may be affirmed as to one, and reversed or dismissed as to the other.

It has been held, at the present term, that, in order to avoid an unauthorized judgment taken in the Court below, the party against whom it was taken must apply to the Court below to set it aside, before bringing the case to this Court. *Harlan v. Edwards*, and *The Cincinnati, &c., Railroad Co. v. Calvert*, at this term (1). No such steps appear to have been taken.

The judgment against *John Mc Cutchen*, is affirmed with costs. As to *John B. Mc Cutchen*, the appeal is dismissed.

R. C. and J. Gregory, for the appellants.

W. C. Wilson and G. Gardner, for the appellee.

(1) *Ante*, 430, 439.

THE STATE v. ORVIS.

13 569
140 243

In an indictment for obtaining goods by false pretenses, it must appear that the goods were obtained by means of the false pretenses.

APPEAL from the *Tippecanoe* Circuit Court.

Thursday,
December 22.

WORDEN, J.—Indictment against the appellee, charging that on, &c., at, &c., he "then and there designing and intending to cheat and defraud one *John F. Smith* of his

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goods, moneys, chattels, and property, did, then and there, unlawfully, feloniously, falsely, and designedly, pretend that he had the sole right to sell to said *Smith* and others, agencies to authorize said *Smith* to buy and sell *Bachedie's* bit counter-sink, and *Arnold's Phoenix* sash-lock, and that no one could sell said bit counter-sink and sash-lock, unless he was an authorized agent, and that agents for said bit counter-sink and sash-lock, could make large sums of money by having the agency, and, also, that he would immediately procure samples and authority to sell said articles from *Orvis, Brothers*. Whereas, in truth and in fact, said *Charles B. Orvis* had no authority to sell any such agency, and whereas, in truth and in fact, said *Smith* could not make money by said agency, and whereas, in truth and in fact, every person had the right, and could sell said bit counter-sink and sash-lock, without an agency for the same, and whereas, said *Charles B. Orvis* did not procure samples and authority to sell said bit counter-sink, and said sash-lock, from *Orvis, Brothers*, all of which pretenses the said *Charles B. Orvis* then and there knew to be false, by color and means of which said false pretense and pretenses, he the said *Charles B. Orvis*, then and there, on, &c., did unlawfully, feloniously, designedly, and falsely obtain from said *John F. Smith*, 40 dollars, then and there being the property of said *John F. Smith*, contrary," &c.

The indictment, on motion of the defendant, was quashed, and the state, by the prosecuting attorney, excepted, and appeals to this Court.

The indictment was bad, and there was no error committed in quashing it. Without adverting to objections that might probably be made, with success, in reference to the character of most of the pretenses themselves, we will notice another point in which the indictment was fatally defective, and that is, that there is no connection shown, whatever, between the pretenses alleged, and the obtaining of the money. To be sure, it is alleged that the money was obtained by means of the false pretenses, but that, in such a case, is not sufficient. This principle is decided in *Johnson v. The State*, 11 Ind. R. 481. There

it was alleged that the defendant presented to one *Nicholson*, certain checks calling for 17 dollars, and represented to him that they were good, and of nearly par value, whereas, &c., by means of which pretense, he obtained from *Nicholson* a set of harness. The indictment was held bad because it did not allege that the checks were delivered to *Nicholson*, or were received by him in payment for the harness. So here, it does not appear that there was any contract or agreement between the defendant and *Smith*, for the purchase, by *Smith*, of an agency to sell the articles mentioned, nor does it appear that *Smith* parted with his money for the purchase of an agency to sell, or any other interest in the articles named.

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Per Curiam.—The judgment is affirmed.

J. L. Miller, for the appellant.

J. M. LaRue and *D. Royse*, for the appellee.

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ACCOUNT STATED.

See PROMISSORY NOTES, 10.

ACTION.

1. One substantive and complete cause of action arising out of the same tort, cannot be divided into several suits.—*Brannenburg v. The Indianapolis, &c., Railroad Co.*, 103.
2. Thus, if A. have two horses killed by the cars of a railroad company, at the same time and place, and he sue and recover for the value of one of them, he cannot afterwards recover in an action for the value of the other.—*Ibid.*

See DISMISSAL; HUSBAND AND WIFE, 2, 3, 7, 14, 15; OFFICIAL BOND; PROMISSORY NOTES, 2, 17; WAGER, 1, 2.

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AGENCY.

If money be placed in the hands of an agent who dies, the principal cannot maintain an action therefor against his administrator, without first demanding "an accounting;" nor does the placing of a claim for such money on the appearance docket operate in lieu of such demand.—*Hannum v. Curtis*, 206.

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APPEAL.

1. Every general tax-payer of the county, has such an interest in the appropriations made by the county board, as to entitle him to the benefits of the statute touching appeals, when he brings himself within its requirements.—*Harlan v. Carroll*, 247.
2. Where an appeal was taken from an order in favor of the auditor for publishing the delinquent list, it was *held*, that the appeal lay, whether the appellant had paid his taxes or not, if he showed that he was entitled to take it, without reference to the *pro rata* assessment for publishing the list.—*Ibid*.
3. In a proceeding to set aside a will, under the statute of 1852, an appeal lies from the Common Pleas to the Circuit Court.—*Henry et al. v. Henry et al.*, 250.
4. Section 43 of that act, giving such appeal, is not unconstitutional. The title of the act properly embraces the section, and the provision for an appeal is not special, within the meaning of the constitution.—*Ibid*.
5. The provision in question was not repealed by the subsequent act authorizing appeals from the Common Pleas and Circuit Courts.—*Ibid*.
6. The statute does not authorize an appeal from an order of the Court refusing or granting a new trial, especially when such order is made at the term at which the cause in which such order was made was tried. The party, to avail himself of an error in refusing a motion for a new trial, must appeal from the final judgment in the cause to which his motion applies.—*Cook et al. v. Otto et al.*, 380.
7. An affidavit for an appeal from the judgment of a justice of the peace in a suit upon a forfeited delivery bond, must show, by a statement of facts, that the party has merits in the appeal.—*Harding v. Mansur et al.*, 454.
8. *Quære*, as to facts that might be sufficient.—*Ibid*.
9. A party will not be allowed to amend his affidavit, in such a case, in the appellate Court.—*Ibid*.
10. When a judgment is rendered against two defendants, before a justice of the peace, and but one of the defendants appeals to the Circuit or Common Pleas Court, the defendant not appealing, is no party to the suit in the appellate Court, and may be a witness in that Court, for the defendant prosecuting the appeal.—*Goodhue v. Palmer*, 457.

See APPEAL BOND; JUDGMENT BY CONFESSION, 3; NEW COUNTIES, 5.

APPEAL BOND.

Where a judgment upon a divorce was rendered in the Circuit Court for 200 dollars alimony, in addition to one-third of the real estate of the defendant, and on appeal by the defendant

to the Supreme Court, the judgment was modified to 3,200 dollars in money, instead of 200 dollars in money and one-third of the real estate, it was *held*, in a suit upon the appeal bond, that the bond was a security for the 200 dollars in money only, of the judgment in the Circuit Court.—*Rice et al. v. Rice*, 562.

APPEARANCE.

1. *It seems* that it is in the discretion of the Court to permit, or to refuse to permit, an attorney to withdraw his appearance in a cause.—*The New Albany, &c., Railroad Co. v. Combs*, 490.
2. A full appearance waives defects in process; but a limited one, for the purpose of making objections, does not.—*Ibid.*

See PRACTICE, 14.

APPRAISEMENT.

In an action upon the assignment of a promissory note secured by mortgage, it is a sufficient defense to show that the note, mortgage, and judgment do not waive the appraisement law, and that property of the maker of the note has been sold upon said judgment without appraisement.—*Cummings v. Pfouts*, 144.

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See ATTACHMENT, 5, 6; MORTGAGE, 5.

ARBITRATION.

See INCUMBRANCES.

ARTICLES OF ASSOCIATION.

See RAILROAD COMPANY, 12, 14.

ASSAULT AND BATTERY.

See CRIMINAL LAW, 12.

ASSIGNMENT.

1. *Of Paper.*—Where a judgment has been taken on a note and mortgage, and the note, mortgage, and judgment are assigned, the assignee has all the rights and remedies which the assignor would have had.—*Applegate et al. v. Mason*, 75.
2. *Of Goods.*—A voluntary assignment contained this clause: "4th. To pay such other debts as we may hereafter specify, out of any surplus which may be left, after paying all the claims and debts in this deed of assignment first described." *Held*, that this provision did not render the assignment void, *per se*.—*Hall et al. v. Wheeler*, 371.
3. Whether or not there has been a delivery of possession under an assignment, is a question for the jury.—*Ibid.*
4. To constitute such delivery, a removal of the goods from the building in which they were assigned, is not necessary.—*Ibid.*
5. And it is not necessary that the assignor should be permanently excluded from the possession. He might act as the agent of the assignee. The circumstance would not be conclusive of fraud.—*Ibid.*

Of Note.]

See GARNISHMENT, 1, 2; PROMISSORY NOTES, 2 to 5, 17.

Of Property.]

See PARTNERSHIP, 2.

ATTACHMENT.

1. Suit against A. and B., partners, upon promissory notes signed by the firm name. Pend-

ing the suit, *C.*, on behalf of the plaintiffs, filed an affidavit, alleging that *A.* was justly indebted to the plaintiffs on the notes in suit, giving the dates of the notes, the time for which they were to run, and the amount paid upon them; that the plaintiffs were entitled to recover the balance, for which suit was pending; that *A.* had transferred or conveyed his property subject to execution, by mortgage to *D.*, and was about to convey the same, with the fraudulent intent to cheat, hinder, and delay his creditors. Upon the filing of this affidavit, &c., a writ of attachment was issued and levied upon the property. *Held*, upon a motion to discharge the attachment, &c., that the affidavit sufficiently conformed to the statute.—*Cooper et al. v. Reeves et al.*, 53.

2. *A.* moved to discharge the attachment for the reasons, that there was property belonging to the firm, subject to execution, sufficient for the payment of the notes; that the property attached was his individual property, first liable for his individual debts, which amounted to 3,000 dollars, due at the commencement of the suit, and more than sufficient to exhaust the property attached; that before the attachment issued, he mortgaged his property to *D.*, in trust, to secure his individual debts, in good faith, with no intent to defraud any creditor, which mortgage was duly recorded, &c., and he denies each and every allegation in the affidavit; all which he is ready to prove, &c. *Held*, that the motion was correctly overruled; that it is only for defects apparent on the face of the proceedings, that such a motion can be maintained.—*Ibid.*
3. A writ of attachment is a lien upon property of the attachment-defendant, from the time it is placed in the sheriff's hands.—*Shirk v. Wilson*, 129.
4. The claims of other creditors filed under an attachment suit, are, under our statute, liens from the time the original writ was placed in the hands of the sheriff, and take priority of judgments rendered after the sheriff receives the writ, even where such judgments were rendered before the filing of such claims.—*Ibid.*
5. The finding of a jury that an attachment-defendant, at the time the writ issued, had sold and transferred his property with intent to hinder and delay his creditors, is not sufficient to authorize a sale without appraisement, unless it be followed by an order by the Court to that effect.—*Ibid.*
6. But if in an attachment suit judgment be rendered in favor of several claimants, and several executions are issued against the same property, some of them collectable without appraisement, a sale without appraisement, or for less than two-thirds of the appraised value, will be held valid; for in such cases, the sale must be upon all the executions at once—no one of the judgments having priority.—*Ibid.*
7. Writ of attachment in favor of *B.*, against *J.*, by virtue of which certain property belonging to him was seized. *J.* gave bond for the delivery of the property, and retained possession of it. Afterwards, he sold it. Afterwards *R.* filed a claim under *B.*'s attachment. Afterwards, *B.* dismissed his attachment. Afterwards, *R.* obtained judgment on his claim, but the Court decided that the attachment, as to his claim, was not a lien on the goods, and, hence, that he could only have a judgment *in personam*, and not *in rem*, for the sale of the attached property. *Held*, that the Court erred.—*Johnson v. Rugg*, 437.

See GARNISHMENT; JUSTICE OF THE PEACE, 2.

ATTORNEY AND COUNSEL.

See CHAMPERTY; DIVORCE, 5.

ATTORNMENT.

Defined.]

See LANDLORD AND TENANT, 1.

B.

BAILMENT.

See CONTRACT, 4.

BASTARDY.

1. Prosecution for bastardy. On the cross-examination of the relatrix, the defendant propounded to her the following interrogatory: "Did you ever, at any time prior to the time you say you were begotten with child by the defendant, have sexual intercourse with any one?" This question was objected to, and the objection sustained. *Held*, that there was no error.—*Townsend v. The State ex rel. Hoshour*, 357.
2. The defendant, as one of the grounds of his motion for a new trial, filed his affidavit stating that since the trial he had discovered evidence material to his defense; that he can prove by *T.* that the grandmother of the complaining witness was at his house but once during the said month of *February*, and that was on the 27th and 28th days; that this was material, because the prosecuting witness swore positively that the child was begotten at the time her grandmother was at the house of *T.*; and that he can prove, and did prove on the trial, that he was not at the house of the prosecuting witness at the time above mentioned; that he did not know what *T.* would swear until the day after the trial, nor could he have known that it would be material on the trial to make such proof; that he never had intercourse with the prosecuting witness, and is not the father of the child. He also introduced the affidavit of *T.*, stating in substance that the grandmother of the prosecuting witness was not at his house in said month of *February*, except on the 27th and 28th days, which were *Friday* and *Saturday*. *Held*, that these affidavits were insufficient to authorize a new trial.—*Ibid.*

BILLS OF EXCHANGE.

Payment to extinguish a bill of exchange must be to the real proprietor, where the relation to it, of all parties interested, is known.—*Woodward v. Elliott et al.*, 516.

See PROMISSORY NOTES.

BILLS OF LADING.

See CARRIERS, 6, 7.

BOND.

1. A bond for the assumption and guaranty of payment of a promissory note, implies a debt due the obligee, which the obligor agrees to pay by paying a debt due from the obligee to another.—*Kirk et ux. v. The Fort Wayne Gaslight Co.*, 56.
2. The bond is an original undertaking, and not merely a contract of indemnity.—*Ibid.*
3. Where a mortgage was executed by husband and wife to secure the performance of the condition of such a bond, and suit was brought against them upon bond and mortgage, judgment for the recovery of the money should not be rendered against the wife.—*Ibid.*

See INJUNCTION.

C.

CARRIERS.

1. Where goods are delivered to a carrier, and they are not transported according to his un-

- dertaking, but are injured or destroyed, the rule of damages is the value of the goods at the place to which they were to be carried, less the freight.—*The Michigan, &c., Railroad Co. v. Caster et al.*, 164.
2. *Quære*, whether a railroad company receiving goods directed to a point beyond the terminus of their route, is liable for such damages at the point to which the goods are directed.—*Ibid.*
 3. Where a part, only, of property transported by a common carrier, is injured, and the remainder is safely carried to the point of destination, the consignee or owner cannot, in consequence of the injury to a part reject the part uninjured, and hold the carrier liable for the whole.—*The Michigan, &c., Railroad Co. v. Bivens*, 263.
 4. The carrier is not made liable for the whole, by a failure to offer to deliver the uninjured part. A carrier by railroad is not bound to make personal delivery of the property to the consignee, nor to offer to deliver it. *Quære*, whether he must give notice of its arrival.—*Ibid.*
 5. It is the duty of the consignee to repair to the depot or place of delivery, for his goods, and the carrier cannot be sued for non-delivery, unless there has been a refusal to deliver on request.—*Ibid.*
 6. A suit against a carrier for a breach of his contract as such, should be upon the bill of lading, under the code, where such a bill is given, and embraces the terms of the contract.—*The Indianapolis, &c., Railroad Co. v. Remmy et al.*, 518.
 7. The terms of such bill of lading cannot be varied by parol evidence.—*Ibid.*

CEMETERIES AND SEPULTURE.

1. The charter of the city of *Indianapolis* does not empower the city council to subject to the control of the city sexton, cemeteries other than those belonging to the city.—*Bogert v. The City of Indianapolis*, 134.
2. **PERKINS, J.**—The bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. But as they cannot be permitted to create a nuisance by them, they may be required, where population is dense, to bury them at a certain depth, or outside of where the population is dense, or likely to become so, and within a reasonable time after death, &c.; but it seems that the burial cannot be taken out of their hands, they being able and willing to perform it.—*Ibid.*

CHAMPERTY.

An agreement by which an attorney is to receive for his services in recovering a claim, a part of the claim or thing to be recovered, is champertous and void.—*Scobey v. Ross*, 117.

CHARTER.

See CORPORATIONS, 1, 2, 3; RAILROAD COMPANY, 9, 10.

COGNOVIT.

See JUDGMENT BY CONFESSION.

COMMERCIAL PAPER.

The bonds of a railroad company are not, it seems, exactly governed by the law merchant. But they pass, by delivery, like bank notes, so as to vest a complete title in a bona fide pos-

essor; and they are entitled to all the privileges of commercial paper.—*The Junction Railroad Co. v. Cleneay*, 161.

See **BILLS OF EXCHANGE**; **GARNISHMENT**; **PROMISSORY NOTES**.

CONCEALMENT.

See **CRIMINAL LAW**, 4, 5.

CONDITION SUBSEQUENT.

See **WILL**, 1, 2, 3.

CONSTITUTIONAL LAW.

An amendment of a statute or section cannot be made without setting out the amended statute or section at full length.—*Armstrong et al. v. Berreman*, 422.

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See **CRIMINAL LAW**, 1, 2, 3.

See **APPEAL**, 3, 4; **HUSBAND AND WIFE**, 4, 5; **NEW COUNTIES**, 1, 2, 3.

CONSTRUCTION.

See **WILL**, 5, 10.

CONTINUANCE.

1. A second affidavit for a continuance at the same term, for the same general reason, namely, the absence of witnesses—the first having been overruled—was held bad, because it did not show a reasonable excuse for the failure to embrace all the reasons for the continuance in the first application.—*Shattuck v. Myers*, 46.
2. The Court has greater latitude of discretion in passing upon such applications, than in ordinary cases.—*Ibid*.
3. Where no affidavit for a continuance appears in the record, the refusal of a continuance cannot be held error on appeal.—*The New Albany, &c., Railroad Co. v. Powell*, 373.
4. The defendant cannot, as of course, and without cause shown, claim a continuance because the plaintiff has failed to answer interrogatories.—*Cleveland v. Stanley*, 549.

See **PROCESS**, 2, 4.

CONTRACT.

1. A sub-contractor cannot pass by his immediate employer, and sue the principal or proprietor of the work.—*The Lake Erie, &c., Railroad Co. et al. v. Eckler et al.*, 67.
2. Where a contract for the delivery of ten thousand bushels of corn specified that two thousand six hundred bushels of the corn was already in pens, and was put at the purchaser's risk as to damage by rain—*held*, that it cannot be implied that the purchaser accepted the corn in pens as being two thousand six hundred bushels.—*Ricketts et al. v. Hays*, 181.
3. *Held*, also, that the vendor must bear all shrinkage, or loss, or damage of the corn in pens, except damage by rain, until the corn was received by the purchaser.—*Ibid*.
4. Where an executory contract stipulates for the delivery of a certain quality of produce, without passing title to any particular produce, the vendor is not a bailee of the produce prior to the delivery at the place and within the time fixed. The contract is discharged by the delivery of the article, of the quality mentioned.—*Ibid*.
5. If, in the absence of fraud or warranty, a purchaser accepts and receives goods, he thereby not only waives defects, but he is so far concluded that he cannot recover for any patent and known defect.—*Ibid*.

6. Where the contract is for the delivery of goods of a certain quality, but the particular article to be delivered is not fixed, there is no warranty that the goods, when delivered, shall be of the quality mentioned; and the failure to deliver goods of such quality is not a breach of warranty, but a breach of the contract.—*Ibid.*
7. A contract for the sale of goods on *Sunday* is void; but the parties, by subsequently acting upon it as a subsisting and valid agreement, may ratify it.—*Banks v. Werts*, 203.
8. Where a contract of sale of land provided "that if default should be made in fulfilling any part of the contract on the part of the purchaser, the seller might regard the contract as forfeited, and re-sell the land;" it was *held*, that the forfeiture of the contract did not exempt the seller, if he enforced the forfeiture, from accounting to the purchaser for payments made, over and above damages accruing from the breach of the agreement, to the seller.—*Gilbreth v. Grewell*, 484.

When Executory.]

See *Wilson v. Ray*, 1.

See FRAUDS, STATUTE OF; PROMISSORY NOTES, 6; REPRESENTATIONS.

CONVEYANCE.

See HUSBAND AND WIFE, 6, 10 to 13; INFANCY, 1; WILL, 8.

CORPORATIONS.

1. Where the charter of a corporation contains no special provision upon the subject, less than a majority of the board of directors have no power to transact business. Their acts are absolutely void, and the corporation cannot ratify them.—*Price v. The Grand Rapids, &c., Railroad Co.*, 58.
2. The law under which the company organized, and orders purporting to have been made by the board of directors, being in evidence, parol evidence may be admitted to show that a majority of the directors was not present when the orders were made.—*Ibid.*
3. The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry, which may compete with the former in the transportation of freight and passengers between given points; and the mere fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages.—*The Lafayette Plankroad Co. v. The New Albany, &c., Railroad Co.*, 90.
4. The ground occupied by an existing company, or their franchise, may be taken, if authorized by the legislature, by a subsequently chartered company, upon making compensation.—*Ibid.*
5. Where any part of the road-bed or track of an existing company, or the property of an individual is taken, so that a proceeding under the statute may be had for the assessment of damages, all the damages occasioned by the taking, both to the ground and franchise, must be assessed and recovered in the statutory proceeding.—*Ibid.*
6. The appraisal of land damages, is a bar to claims for injuries by fire from engines, obstructing access to buildings, exposing persons or cattle to injury, cutting off the flowage of water, &c., even though such damages were unknown to the appraisers at the time of the assessment.—*Ibid.*
7. But where no part of the property of an existing company, or of an individual, is taken, unless the statute plainly authorizes a proceeding to assess damages for consequential injuries, such damages may be recovered in an ordinary action at law.—*Ibid.*
8. In the construction of the work for which the property of another is taken, reasonable care and skill must be exercised, or the party will be liable to an action for the tort, as at common law.—*Ibid.*

9. In an action in the nature of an action on the case to recover such damages, it may be presumed that the plaintiff had claimed and recovered, under the statute, such damages as the location selected would occasion.—*Ibid.*
10. A party proceeding under the statute to recover such damages, may have an injunction till the damages are paid; and, perhaps, to control the location. In the proceeding for the assessment of damages, the question of location is examinable.—*Ibid.*

See RAILROAD COMPANY; VENUE, 2, 3.

COSTS.

1. Suit upon a judgment rendered in *Pennsylvania*. The original suit was an action of replevin, in which the property was delivered to the plaintiff, and he had judgment upon the verdict of a jury for 3 dollars and 33 cents in damages. No statute of *Pennsylvania* was pleaded by either party. *Held*: The Court is not judicially informed, whether, by the law of that state, it was necessary for the jury to find, and the judgment to show, in whom the title to the property was; nor whether the costs followed the judgment for damages or not. The judgment itself does not show anything upon the subject. Indeed, if entered in this state, it would be informal, as it is merely a memorandum stating that there is judgment on the verdict.—*Keely v. Garner et al.*, 399.
2. The judgment below was for 170 dollars, and is not for too much if the plaintiff was entitled to recover for the costs in the replevin suit, as contained in the transcript. In the transcript is a receipt, in the following form, at the foot of the column, where the costs are summed up: "Received from ex. of plaintiff.—*J. Steel*." Other parts of the record show *J. Steel* to have been the prothonotary of the Court. No other evidence was adduced but the transcript. As no statute of *Pennsylvania* is shown, it is presumed, in accordance with the usual practice, that the right of the plaintiff to a judgment for costs, followed his recovery in the suit against the defendant, as an incident thereto.—*Ibid.*
3. Complaint as follows: "And plaintiff further complains and says that said defendant is indebted to him, the said plaintiff, in the sum of 75 dollars, for three hundred bushels of apples (the property of said plaintiff) of the value of 75 dollars, or 25 cents per bushel, which were, on or about the 25th day of *October*, 1857, taken and carried away from plaintiff's orchard, in said county of *Hendricks*, by said defendant, without the license of him, the said plaintiff; wherefore, he demands judgment for 100 dollars." *Held*: This paragraph sounds in tort, and not in contract. It is, in substance, a count in trespass *de bonis asportatis*. Although all distinction between forms of actions is abolished, yet, for the purpose of determining the question as to costs, it is necessary to ascertain whether the action is, in substance, based upon a contract or upon a tort. By § 397 of the code, it is provided that "in actions for money demands on contract," in certain cases, the plaintiff, unless he recover 50 dollars, shall pay costs. This action, however, being based upon tort, and not upon contract, is not within the provisions of the section cited, and the plaintiff was entitled to costs.—*Wiley v. Brattain*, 401.
4. A party for whom a judgment is rendered, may, it seems, in some cases, be taxed with the costs.—*Chandler v. Chandler*, 492.
5. Counter-affidavits are not admissible on an application for security for costs on account of non-residency.—*Smith v. Chandler et al.*, 513.
6. A justice of the peace is not bound, of his own motion, to require security for costs, at, or before, commencing suit, from a non-resident plaintiff.—*Hauser v. Smith et al.*, 532.

See DEED, 7; OFFICIAL BOND, 4; PRACTICE, 10.

COUNTERFEITING.

1. Where an indictment for having in possession counterfeit bank notes, alleges that they are in the defendant's possession, a sufficient excuse for the want of a particular description of the notes is shown.—*Armitage v. The State*, 441.
2. On the trial, the defendant cannot be compelled to furnish evidence against himself by producing the notes.—*Ibid.*
3. But, nevertheless, the contents of the notes cannot be proved by parol evidence, on the trial, unless notice to produce them has been given, according to the rule of practice in civil cases.—*Ibid.*

See CRIMINAL LAW, 6 to 10.

CRIMINAL LAW.

1. When a valid indictment has been returned by a competent grand jury to a Court having jurisdiction, and the defendant has been arraigned and has pleaded, and a jury has been impaneled, sworn, and charged with the cause, and all the preliminary things of record are ready for the trial, the jeopardy contemplated by the constitution has attached, and the defendant is entitled to a verdict.—*Morgan v. The State*, 215.
2. The defendant may, by consent, or by acts from which consent will be presumed, waive this constitutional right, or unforeseen occurrences may intervene which will operate to withdraw the privilege.—*Ibid.*
3. But where the indictment is valid, and the proceedings before a Court having jurisdiction regular, down to the time jeopardy attaches, no second jeopardy can be allowed in favor of the state on account of any lapse or error at a later stage.—*Ibid.*
4. It does not follow that because the owner of stolen goods, and his family, have no knowledge of the fact that the goods have been stolen, there is a concealment of the fact on the part of the thief.—*Free v. The State*, 324.
5. *Quære*, what would amount to such a concealment?—*Ibid.*
6. Indictment for passing counterfeit money. A witness was permitted to testify that the wife of the defendant had sold to him a counterfeit twenty-dollar bill belonging to defendant, in his absence, but that the defendant was subsequently advised of the transaction and sanctioned it. This was not the bill for which he was indicted; but the transaction was about the time of the offense alleged. *Held*, that the testimony was admissible as tending to show knowledge on the part of the defendant that the bill passed by him was counterfeit.—*Bersch v. The State*, 434.
7. The declarations of a witness, as to his place of residence, are not always immaterial, touching his credibility; but in this case, the previous statement proposed to be proved does not appear to materially conflict with that proposed to be impeached.—*Ibid.*
8. A witness, in this case, was asked if he had not passed a counterfeit bill as a genuine one in *L.*, and what he had sworn about it on a former occasion. The Court ruled the question inadmissible. *Held*, that there was no error. But, *held*, also, that perhaps the Court might, in its discretion, have let the question go to the witness under proper advice.—*Ibid.*
9. It is always proper to ask a witness as to his relationship to the parties, and the state of his feelings towards them, with a view that the jury may judge of the impartiality of his testimony.—*Ibid.*
10. The Court, in this case, instructed the jury that the question whether a certain witness had counterfeit money in his possession or not, had nothing to do with the guilt or inno-

cence of the accused. *Held*, correct as an abstract proposition; but, *held*, also, that such fact might have had a bearing upon the credit of the witness, or not, depending upon the further question whether the counterfeit money was properly or improperly in his possession; and if the evidence tended to show that the money was in his hands for an improper purpose, the defendant should have asked an additional instruction applicable to the facts, in order to put himself in a position to complain of that given.—*Ibid*.

11. A new trial will not be granted in a criminal case, because the jury, without the permission of the Court, took to their room papers which were given in evidence, if, so far as appears, the papers were taken inadvertently, without improper intervention by any person, and it is not shown that the jury made any use of them.—*Ibid*.
12. Where an assault and battery is not the gravamen of, but merely an incident occurring at a riot, a final judgment in the prosecution for one of the offenses may not be a bar to a prosecution for the other.—*Wininger et al. v. The State*, 540.

See BASTARDY; COUNTERFEITING; FORMER CONVICTION; GAMING; INDICTMENT; JUSTICE OF THE PEACE, 1; MALICIOUS TRESPASS; MANSLAUGHTER; NEGROES AND MULATTOS; ROBBERY; SEDUCTION; USURY.

D.

DAMAGES.

See CARRIERS, 1, 2; CORPORATIONS, 5, 6, 7, 9, 10; RAILROAD COMPANY, 6, 8; STREETS, 2.

DEED.

1. Equity will not aid in perfecting title under a voluntary deed.—*Froman v. Froman*, 317.
2. Parol evidence is admissible to remove a latent ambiguity in a deed or will.—*Symmes et al. v. Brown et al.*, 318.
3. And where such evidence is given, the whole, including the instrument, may be referred to the jury.—*Ibid*.
4. Where there is no ambiguity, the Court must declare the legal effect of the instrument.—*Ibid*.
5. There is no ambiguity in the deed copied in the opinion in this case.—*Ibid*.
6. The deed conveys the interest of each of the parties named in it, in the lands particularly mentioned in the premises, and again in the *habendum*.—*Ibid*.
7. The Court of Common Pleas has jurisdiction to appoint, in a proper case, a commissioner to make a deed in discharge of a title bond.—*Cortner et al. v. Amick*, 463.
8. The estate, or heirs of the deceased obligor, in such bond, should be taxed with the costs necessarily incident to the making of such deed; but if they be increased by improper resistance on the part of any of the necessary parties to the suit, such party may be taxed with such increase of costs.—*Ibid*.

See PATENTS.

DEFAULT.

Where judgment was rendered by default, and no motion was made to set aside the default, nor any proceedings instituted for relief from the judgment, or to review it—*held*, upon the authority of *Blair v. Davis*, 9 Ind. R. 238, that there is nothing for the consideration of the Supreme Court, on appeal.—*Harlan et ux. v. Edwards*, 430; *Lasselle et al. v. Wilson*, 453.

See PRACTICE, 12.

INDEX.

DELIVERY.

See ASSIGNMENT, 3, 4, 5.

DEPOSITIONS.

1. A notice, given in *Centreville, Indiana, December 23, 1856*, to take depositions in *Rochester, Monroe county, New York*, on *Thursday*, the first day of *January* ensuing—the term of the Court in which the cause was to be tried, commencing on the first *Monday* of the latter month—was held to be sufficient.—*Hipes v. Cochran*, 175.
2. The Courts, in such cases, will take notice of the facilities of travel, in determining the time necessary to pass from point to point.—*Ibid.*
3. A notice to take depositions “in the office of the clerk of *Marshall* county, in the state of *Illinois*,” is too vague as to place; but where the deposition was not in the record, nor shown to have been read upon the trial, and the Supreme Court had no means of determining its character, it was held that the error was not sufficient to reverse the judgment.—*Rodman et al. v. Kelly*, 377.

DESCENTS.

1. A husband made a will by which, after providing for the payment of his debts, &c., he bequeathed to his wife all the rest of his estate, both real and personal, during her life, and “to be disposed of by her at her pleasure.” He died, leaving no child, nor father nor mother. The statute regulating descents, &c., provides that “If a husband or wife die *intestate*, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go to the survivor.”
Held, that a surviving wife takes the estate, in such case, under the statute, notwithstanding a will may have been made, so far as it is not otherwise disposed of by that will.—*Armstrong et al. v. Berreman*, 422.
2. Section 41 of the statute regulating descents, can have no bearing upon a case of this kind.—*Ibid.*

DISCONTINUANCE.

An illegal discharge, by the Court, of a jury in a civil case, does not work a discontinuance of such case.—*Ashbaugh v. Edgecomb*, 466.

DISMISSAL.

The simple dismissal of a suit is no bar to another suit upon the same cause of action.—*Crews et al. v. Cleghorn et al.*, 438.

DISTRIBUTION.

Of Proceeds of Receiver's Sale.] See MORTGAGE, 7.

DIVORCE.

1. The policy of our law is against disturbing divorces granted.—*McQuigg v. McQuigg*, 294.
2. The common-law right to set aside a judgment of a superior Court by bill in chancery, for fraud, or by complaint in the nature of such a bill, was entirely superseded by the various provisions of our code for the vacation of judgments. The statutory mode must be resorted to.—*Ibid.*
3. Thus, judgments of divorce can only be set aside upon a motion for a new trial, made within the time allowed therefor.—*Ibid.*

4. Alimony may be granted to the wife as incident to a judgment for a divorce in favor of the husband; but such an allowance will not be made, unasked.—*Chandler v. Chandler*, 492.
5. The Court cannot, in a divorce case, appoint an attorney for an adult *compos mentis* party to a suit, against the consent of such party, and tax a fee for such attorney with costs.—*Ibid.*
6. Where, upon granting a divorce, the Court, in its judgment, assigns the custody of the children to one of the parties, such disposition of the children will control, till the judgment making it is modified by the Court, upon proper application; and cannot be disregarded in a subsequent proceeding by *habeas corpus*, to obtain possession of the children.—*Williams v. Williams et al.*, 523.

See APPEAL BOND.

DOMICIL.

See GUARDIAN AND WARD, 2, 3, 4.

DOWER.

Strong v. Clem, 12 Ind. R. 37, affirmed; *Giles v. Gullion*, 487; *Frantz et al. v. Harrow*, 507. *Inchoate abolished.*]

See LIMITATIONS, 2.

E.

ELECTIONS.

The first general election for city officers in the incorporated cities of *Indiana*, was to be held, under the amendatory act of 1859, on the first *Tuesday* in *May* of that year.—*Williams et al. v. Connelly et al.*, 502.

EMPLOYER AND EMPLOYEE.

See RAILROAD COMPANY, 4 to 8.

ERROR.

Assignment as follows: 1. The decision and judgment of the Court is not sustained by the evidence. 2. The judgment of the Court is contrary to law. *Held*, too general.—*Davis v. Scott*, 506.

Release of.]

See JUDGMENT BY CONFESSION, 3.

Cross Errors.]

See PRACTICE, 15.

See NEW TRIAL, 8.

EVIDENCE.

1. Where the only issue in a suit for work and labor, was raised by a general denial, it was *held* that evidence of payment was not pertinent.—*Baker et al. v. Kistler*, 63.
2. A defendant cannot introduce, as evidence, a paper filed in a previous action by the plaintiff against another defendant, though brought, in part, for the identical money or thing in suit in the present action.—*Burroughs et al. v. Hunt*, 178.
3. Where a party pleads a fact affirmatively, the *onus* of proving it rests upon him.—*Hannum v. Curtis*, 206.
4. Where a receipt, introduced in evidence, does not appear to be related to the matters involved in the suit, it is error to refuse to charge the jury that such receipt "is no evidence of a settlement of any account, other than the items therein stated."—*Ibid.*

5. Where the declarations of an agent are a part of the *res gestæ* of his acts within the scope of his agency, they are legitimate evidence.—*The Toledo, &c., Railroad Co. v. Fisher*, 258.
 6. If such declarations are erroneously admitted before proof of the agency, subsequent proof of the agency is error.—*Ibid.*
 7. To lay a proper foundation for secondary evidence, it must be shown that the original writing is lost, or destroyed by time, mistake, or accident, or is in the hands of the adverse party, who has had due notice to produce it on the trial.—*The Anderson Bridge Co. v. Applegate et al.*, 339.
 8. Error in excluding such evidence cannot be examined by the Supreme Court, unless the record show a motion for a new trial.—*Ibid.*
 9. Where a witness testified that a certain paper was in the city clerk's office, and the city clerk testified that he had made a thorough search for it in his office, where he supposed it would be likely to be found, and could not find it, it was *held* that a copy of the paper might be given in evidence.—*Little v. The City of Indianapolis*, 364.
 10. A party may prove by parol that in a previous suit he offered and gave in evidence a judgment.—*Denny et al. v. Moore*, 418.
 11. *Quære*, whether it can be proved by parol that a place at which a note is payable, is a bank, though not so described in the note.—*Forst v. Elston et al.*, 482.
 12. If a note sued on is lost, and cannot be found on diligent search, its contents may be proved.—*Cleveland et al. v. Worrell*, 545.
 13. The loss, and personal diligence of the loser, may be shown by his affidavit.—*Ibid.*
- See BASTARDY, 1; COUNTERFEITING, 2, 3; CRIMINAL LAW, 6 to 10; DEED, 2, 3; CORPORATIONS, 2; EXECUTORS AND ADMINISTRATORS; NEW COUNTIES, 4; PROMISSORY NOTES, 15, 20; RAILROAD COMPANY, 15; SEDUCTION; WITNESS.

EXCEPTIONS.

Where a party objects to a ruling of the Court, but does not follow up his objection by taking an exception to such ruling, the objection is waived.—*Vance v. Cowing, et al.* 460.

EXECUTORS AND ADMINISTRATORS.

1. If a party is sued for money placed in his hands for a special purpose, he must show to what extent he has complied with his undertaking to apply it to such purpose; for payments made in pursuance thereof are peculiarly within his knowledge; and the same rule applies to his personal representative after his death.—*Hannum v. Curtis*, 206.
2. The administrator of an estate which has been declared insolvent, is not obliged to set off a judgment in favor of his decedent, against a claim upon his estate; but having done so, he cannot complain because it makes an unequal distribution. Setting off a judgment in such case, is an extinguishment of it.—*Denny et al. v. Moore*, 418.

See AGENCY.

F.

FENCES.

See RAILROAD COMPANY, 2, 17, 18.

FIRE.

Destruction by.] See LANDLORD AND TENANT, 7; VENDOR AND PURCHASER, 4.

FORMER CONVICTION.

Prosecution in the Common Pleas for a riot. The evidence showing that the defendant had been convicted for the identical riot, before a justice of the peace, it was *held*, that the prosecution in the Common Pleas would not lie.—*Trittipo v. The State*, 360.

See CRIMINAL LAW, 12.

FRANCHISE.

See CORPORATIONS, 4.

FRAUD.

See ASSIGNMENT, 5.

FRAUDS, STATUTE OF.

1. Where no time is fixed for the performance of a contract; or where it is to be performed by a certain day (the right to perform it sooner not being precluded); or where the performance depends upon a contingency which may or may not happen within a year, the contract is not within § 1 of the statute of frauds. R. S. 1843, p. 589.—1 R. S. p. 299.—*Wilson v. Ray*, 1.
2. But where, by its terms, a contract is not to be performed within the year; or where it cannot be performed within the year, according to the intent and understanding of the parties, as evidence by the contract, it is within the statute.—*Ibid*.
3. Where the agreement of the defendant upon which suit is brought, is not, in any event, to be performed within a year, it is within the statute, although there may be other stipulations providing for contingencies that would make the plaintiff liable to the defendant within a year, and release the defendant altogether.—*Ibid*.
4. A promise to pay money after the expiration of a year, is as much within the statute as a promise to do any other act.—*Ibid*.
5. Although a contract may be performed on one side within a year, yet if it cannot on the other, it is within the statute.—*Ibid*.
6. Contracts of partnership are as much within the statute as other contracts.—*Ibid*.
7. A fraudulent refusal to put a contract in writing cannot have the effect of putting it in writing.—*Ibid*.

FRAUDULENT CONVEYANCE.

See HUSBAND AND WIFE, 15, 16, 17.

G.

GAMING.

In an information or indictment for gaming, the amount or value of the article lost or won, should be set forth with certainty, in order, among other things, that it may appear what amount of fine may be assessed under the statute, that fact being necessary to enable the Court to determine what tribunal has jurisdiction of the offense.—*Long v. The State*, 566.

See WAGER.

GARNISHMENT.

1. A person indebted by a note not negotiable, or not assignable by the law merchant, may

be made liable as a garnishee, after the note has become due and before it is assigned, but not, as a general rule, before it becomes due, nor after he has had notice of its assignment, if he rely upon such notice in his answer.—*The Junction Railroad Co. v. Cleneay*, 161.

2. The judgment rendered against him as a garnishee, will bar a subsequent action by an assignee who had not given notice of the assignment prior to such judgment.—*Ibid.*
3. He may be subjected to such judgment before the note is due, where all the parties are residents of the state, and are before the Court, so that the maker may be protected from a second liability; though he cannot be compelled to pay until the note falls due.—*Ibid.*
4. But the maker of a note or bond negotiable by the law merchant, cannot be subjected to such judgment, without proof by the plaintiff that the negotiable paper actually remains, at the time of the trial, in the hands of the debtor against whom the attachment issued, as his property, or in the hands of a fraudulent assignee.—*Ibid.*

GUARDIAN AND WARD.

1. By the statute of 1852, removal from the state is a sufficient cause, in the discretion of the Court, for the removal of a guardian.—*Nettleton v. The State*, 159.
2. The domicil of the parents at their death, is the domicil of their infant heir, and he cannot change that domicil of his own volition.—*Warren v. Hofer*, 167.
3. The distribution of personal property descending to such infant, wherever situated, must be governed by the law of that domicil, and the property should be remitted there for that purpose; and the Court there is under no obligation to remit funds to another state for the education and maintenance of the infant.—*Ibid.*
4. Hence, that domicil is the proper place for the residence and education of the infant, and a Court of another state may direct him to be delivered up to be taken to that place by the proper guardian; and although the power of a guardian is local to the state in which he receives his appointment, yet he is competent to receive the property or the custody of the ward when placed in his hands by such Court, to be taken to the state where both belong.—*Ibid.*
5. But such guardian, to entitle him to receive the property or the custody of the ward, must make proof of his guardianship.—*Ibid.*
6. The Court must use a sound discretion in making orders in such cases.—*Ibid.*

See INFANCY, 2.

H.

HUSBAND AND WIFE.

1. In August, 1851, *M. H.*, then a *feme sole*, executed to *P. H.* a note for 500 dollars. In May, 1852, she married *E. H.* In 1854 she died, leaving the note unpaid. In 1858, the payee of the note commenced suit to recover the amount of it from *E. H.*, the surviving husband. Said *E. H.* received about 800 dollars by his wife. *Held*, that if this case was to be governed by the R. S. of 1852, there would be no difficulty. Those statutes provide that in all marriages hereafter contracted, the husband shall be liable for the debts and liabilities of the wife contracted before marriage, to the extent of the personal property he may receive with or through her, or derive from the sale or rent of her lands, and no farther. Such liability of the husband shall not be extinguished by the death of the wife. 1 R. S. p. 320. But this case is not to be controlled by the statute quoted. The statute applies, by its terms, only to cases where the marriage occurred after its passage. The

case under consideration is to be determined by the principles of the common law. By that law, the husband was liable during coverture for the debts of his wife, *dum sola*; but his liability ceased when the coverture ceased. Nor did the fact that the husband received property by his wife alter the case; even the very property for the purchase of which the debt was contracted. The decision of this case below seems to have been influenced by the fact that our statute has declared that the separate property of the wife shall remain hers, free from the control of her husband, and from liability to his debts. This provision has no effect upon a case like the present. It has changed the common law to this extent only. By the common law, the husband could appropriate the personal property of the wife, where it could be done without going into chancery, without her consent; by the statute, he can only do it with her consent; and with her consent, he can do it. The wife can bestow, by an executed gift, any property she may possess, upon her husband, if she pleases, as may the husband upon the wife. And the provision of the statute has not increased the liability of the husband to the creditors of the wife. If the husband receives the separate property of the wife by her free gift or consent, and without any condition, he does not, by the section of the statute under consideration, hold it as a trustee for her, and liable to be charged, as a trustee, with the amount after her death. Nor would a simple voluntary promise, by the husband after the death of his wife, to pay her debts, contracted *dum sola*, render him legally liable. The promise would be without consideration. Where he had received property from his wife, at or during coverture, there might be a moral obligation upon him to pay such debts; but a moral obligation, simply, will not support such a promise. The obligation must be a legal one. If such a promise had been made to the wife, or to the creditor of the wife, as the condition upon which the wife consented to the reception by the husband of her separate estate, he might be liable upon it. If the marriage in question had been celebrated after the revised statutes of 1852 came into force, the surviving husband would have been liable to pay the note, because he had received property of his wife to the amount of it. And the fact that he received it by way of gift, or with the consent of his wife, would not relieve him from the liability. It is only by such modes that the husband can, under the statute, possess himself of the separate property of his wife.—*Hetrick v. Hetrick*, 44.

2. While a *feme sole* occupied certain premises, she married, and afterwards, with her husband, continued the occupation.

Held, first, that for the time she occupied as a *feme sole*, suit would necessarily be brought against her and her husband; but unless it were shown that he received property by her at marriage or afterwards, the judgment would be levied of her separate property.

Second, that for the time the husband and wife occupied the premises, the suit and the judgment, *prima facie*, should be against the husband alone.—*Tobin et ux v. Connery et ux.*, 65.

3. Where the suit and the judgment, in such case, were against husband and wife, jointly, there is a misjoinder both of causes of action and parties.—*Ibid.*

4. At common law, the husband, at marriage, became entitled to the wife's personal property as absolutely as if he had purchased it from a third person; but the rule has been abrogated in this state by 1 R. S. p. 321, § 5, and Acts of 1853, p. 57, § 5.—*Scott v. Scott*, 225.

5. The latter enactment is not unconstitutional.—*Ibid.*

6. By these statutes, the wife cannot convey her personal property without the consent of her husband; but otherwise she is as fully entitled to the use, possession, and control of her separate personal property as if she were unmarried; and this right exists as against the husband, as well as against the world at large.—*Ibid.*

7. The wife may sue her husband in respect of such separate property.—*Ibid.*

8. Husband and wife, under our statute, are incompetent witnesses for and against each other, while the marriage relation exists; but after it ceases to exist, they are competent, as to

anything the knowledge of which was not obtained through the privacy of the marriage relation.—*Woolley v. Turner*, 253.

9. But where the relation existed at the time the claim sued upon accrued, it will be presumed, the contrary not being shown, that it still exists.—*Ibid.*
10. A conveyance by husband and wife, the wife being under age, cannot be avoided by her, even as to herself, simply on the ground of infancy, until her arrival at majority.—*Chapman et al. v. Chapman*, 396.
11. At that time, it seems, she might, by some legal mode, avoid the conveyance as to herself, to prevent the possible accruing of an estoppel.—*Ibid.*
12. But such avoidance would not, of course, enable her to obtain possession of the property until after the decease of her husband.—*Ibid.*
13. She might, probably, avoid the conveyance as to herself, for fraud, before arriving at majority.—*Ibid.*
14. She could not have an action for alimony simply, at common law; and the common law has been followed on this point in *Indiana*.—*Ibid.*
15. But the statute of 1857 gives such an action; and after the Court in such action has given judgment for alimony, it may set aside a fraudulent conveyance standing in the way of its collection, as in other cases.—*Ibid.*
16. A conveyance will not be disturbed for the collection of a merely nominal judgment for alimony, at least till after a refusal or failure to pay that nominal judgment without such disturbance.—*Ibid.*
17. Perhaps the officers of Court might, through the judgment, reach the land for the collection of their costs, as in other cases of land fraudulently conveyed.—*Ibid.*
18. In a proceeding of this kind, the Court may ascertain the cause and the circumstances of the abandonment. If it occurred under circumstances mitigating or justifying it, it would seem that an equitable case is not made out for giving more than what necessity requires for a support, in connection with the wife's own earnings, where the property of the husband amounted to but 700 dollars.—*Ibid.*
19. A note made payable to husband and wife, on a loan of money by the husband, is, in legal effect, payable to the husband, and the right to sue on it survives to him.—*Leedy v. Crumbaker et al.*, 523.

See DESCENTS; DIVORCE; PROMISSORY NOTES, 8.

I.

INCUMBRANCES.

The submission to arbitration of the question of damages for an admitted incumbrance upon property sold as free of incumbrance, is not within the prohibition of § 2, 2 R. S. p. 228.—*Snodgrass v. Smith*, 393.

See LIEN.

INDIANS.

Quære, whether, where land is reserved to an *Indian*, and restricted from sale without the consent of the president of the *United States*, a Court, after the death of such *Indian*, can order the land to be sold without the consent of the president.—*Crews et al. v. Cleghorn et al.*, 438.

INDICTMENT.

In an indictment for obtaining goods by false pretenses, it must appear that the goods were obtained by means of the false pretenses.—*The State v. Orvis*, 569.

See COUNTERFEITING, 1; GAMING; ROBBERY.

INDORSEMENT.

In Blank.]

See PROMISSORY NOTES, 20.

INFANCY.

1. If a person contract with an infant to receive from him a conveyance of land, which he knows, at the time of contracting, will be executed before the infant shall have arrived at his majority, he cannot avail himself of that fact in defense of a suit upon a note for the purchase-money.—*Beeson v. Carlton*, 354.
2. An infant without an appointed guardian, and without an estate of inheritance, living in the family of his mother, a widow, is subject to her control, as his natural guardian, and she is entitled to his wages; and where such an infant, while in the employ of a railroad company, was killed by a train, through the negligence of their agent—*held*, that an action would lie in the mother's name, for damages. But, *held*, also, that as such guardian, the mother could not, it seems, assume the custody of any separate estate the son might possess.—*The Ohio, &c., Railroad Co. v. Tindall*, 366.
3. Section 27, 2 R. S. p. 33, authorizing such an action, is not repealed by § 784, *id.* p. 205. The latter section applies to adults, the former to infants—*Ibid.*

See GUARDIAN AND WARD; HUSBAND AND WIFE, 10 to 13; RAILROAD COMPANY, 4, 8.

INFORMATION.

See GAMING; NEGROES AND MULATTOS; USURY.

INJUNCTION.

A complaint for an injunction, need not aver that a bond has been filed.—*Smith v. Chandler et al.*, 513.

See CORPORATIONS, 10; OFFICE; USURY.

INSURANCE.

Where a policy of insurance is an open one, and is for the insurance of such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary, in a pleading based upon the policy, against the insurance company, to aver that an amount had been mutually agreed upon and indorsed upon the policy.—*Crane et al. v. The Evansville Insurance Co.*, 446.

INTEREST.

A written instrument acknowledging an amount of money to be due on settlement of accounts, but subject, on a contingency, to a deduction, draws interest, under our statute, upon the amount remaining after the deduction has been made.—*Kellenberger v. Foresman*, 475.

INTERROGATORIES.

See CONTINUANCE, 4; PROMISSORY NOTES, 14.

J.

JEOPARDY.

When it Attaches.] See CRIMINAL LAW, 1, 2, 3.

JUDGMENT.

1. An order for the sale of land of a deceased person, by the proper Court, is not a final judgment.—*Crews et al. v. Cleghorn et al.*, 438.
2. Under the code, judgment, in cases *ex contractu*, may be rendered against some, and for other of the defendants, according to the old chancery practice.—*Cutchen et al. v. Coleman*, 568.

Priority of.] See ATTACHMENT, 6.

To be in rem.] See ATTACHMENT, 7.

Vacation of.] See DIVORCE, 1, 2, 3; JUSTICE OF THE PEACE, 5; PROCESS, 4.

For Alimony.] See HUSBAND AND WIFE, 15, 16, 17.

Of Foreign Court.] See PLEADING, 4.

In favor of Replevin Bail.] See REPLEVIN BAIL.

See APPRAISEMENT; ASSIGNMENT OF PAPER; BOND, 3; EVIDENCE, 10; EXECUTORS AND ADMINISTRATORS, 2; GARNISHMENT, 2, 3, 4; HUSBAND AND WIFE, 2, 3; JUDGMENT BY CONFESSION; MORTGAGE, 1 to 6; PARTNERSHIP, 2, 3; SUBSCRIPTION OF STOCK, 3.

JUDGMENT BY CONFESSION.

1. The statute does not require that a warrant of attorney to confess a judgment, with the affidavit attached, shall be appended to a transcript of the judgment offered in evidence. And if it does not appear upon the record that there was no such affidavit, the Supreme Court will not presume that there was none.—*Applegate et al. v. Mason*, 75.
2. *Quære*, whether such a judgment, rendered without such affidavit, can be attacked collaterally.—*Ibid.*
3. By our practice, a warrant of attorney to confess a judgment is entered upon the record immediately preceding the judgment, and, in effect, becomes a part of it. Hence, where the warrant contained a release of errors and a waiver of the right of appeal, it was *held*, that the defendant could not appeal in violation of its terms.—*Miller et ux. v. Macklot et al.*, 217.

JURISDICTION.

1. Prior to the act of 1859, the Common Pleas had not jurisdiction, except in certain special cases, where the amount involved was 1,000 dollars or upwards.—*Murdock v. Wheelock et al.*, 472.
2. The jurisdiction given to the Common Pleas to foreclose mortgages, confers also the power, in such cases, to settle the title to the real estate whenever it shall be in issue.—*Toner v. Mitchell*, 530.

Of Mayor.] See TOWNS AND CITIES.

See DEED, 7; GAMING; JUSTICE OF THE PEACE, 2, 3, 4.

JURY.

If the Court, in charging the jury, assumes a material fact, it usurps the prerogative of the

jury, and the judgment may be reversed, although the evidence is not in the record.—*Bell et al. v. Hungate*, 382.

See ADJOURNMENT; ASSIGNMENT, 3; CRIMINAL LAW, 11; DISCONTINUANCE; NEW TRIAL, 1 to 4; VERDICT; WITNESS.

JUSTICE OF THE PEACE.

1. A justice of the peace has no power to grant a new trial or hearing of a criminal cause, after the prisoner has been once recognized, or the cause finally disposed of.—*Steel v. Williams*, 73.
2. Section 71, 2 R. S. p. 464, authorizes an action before a justice of the peace to recover possession of personal property taken by attachment issued from the Common Pleas, against a person other than the plaintiff, where the value of the property is not more than 100 dollars.—*Rodman et al. v. Kelly*, 377.
3. The right of property taken upon execution, may be tried before a justice of the peace, without reference to the value of the property as limiting the jurisdiction.—*Griffin v. Malony et al.*, 402.
4. The general statute defining and limiting the jurisdiction of justices does not apply to this special proceeding.—*Ibid.*
5. A justice of the peace cannot vacate a judgment rendered by him in a suit between parties, on the application of one, without notice to the other party.—*Smith v. Chandler et al.*, 513.

See APPEAL, 7 to 10; COSTS, 6; PARTNERSHIP, 4; PROCESS, 2, 3, 4.

L.

LANDLORD AND TENANT.

1. Attornment is the acknowledgement by a tenant of a new landlord, on the alienation of land, and an agreement to become tenant of the purchaser.—*Lindley v. Dakin*, 388.
2. Occupancy by a tenant, of property sold, where the fact and the title of the tenant are known at the time to the purchaser, is not a breach of the covenant of right of possession; and if no special contract is made, the occupant becomes tenant to the purchaser, and the possession of the tenant is the possession of the landlord.—*Ibid.*
3. But as the possession of real estate, within a certain statutory period, may be the subject-matter of a valid parol contract, it would seem, if such a contract was made between the purchaser and the seller, that a suit in relation to such possession, would necessarily have to rest upon a breach of the parol contract, and not upon the covenants of the deed.—*Ibid.*
4. As a general rule of law, the landlord is not bound to repair without a special agreement, but the tenant is.—*Kellenberger v. Foresman*, 475.
5. While either party is legally, and with reasonable diligence, making repairs, the rent still runs against the tenant.—*Ibid.*
6. If, on an executed sale of real estate, it be agreed by parol that the vendor shall retain the possession for a given time, he stands, while so occupying, so far as liability for the destruction or injury of the property is concerned, in the relation of a tenant to the vendee.—*Wainscott et ux. v. Silvers*, 497.
7. The tenant is not answerable, in the absence of an express agreement, for the destruction, by accidental fires, of buildings occupied.—*Ibid.*

LARCENY.

Concealment of.]

See CRIMINAL LAW, 4, 5.

INDEX.

LEASE.

See WILL, 4.

LEVY.

See MORTGAGE, 1; TRESPASS.

LIEN.

If one party has a lien upon two pieces or lots of real estate for a debt, and another party has a lien upon one of them for another debt, the latter may compel the former to resort to the other piece, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights, or operate to the prejudice of the party holding the lien upon both pieces.—*Applegate et al. v. Mason*, 75.

See ATTACHMENT, 3, 4; MORTGAGE.

LIMITATIONS.

1. Complaint to recover possession of land, averring that it belongs to the plaintiffs and is in possession of the defendant, and had been for six years. Answer, the statute of limitations, and that the land had been sold, by order of the Probate Court, by an administrator, &c., in 1834, under whom the defendant holds as a remote vendee, &c., and that the suit had not been commenced within five years after the confirmation by said Court of said sale, nor within twenty years after the cause of action accrued. Reply, that the plaintiffs were the only heirs, &c.; that they were not made parties to any application to sell the land, nor had they any notice thereof, wherefore the sale was void; that they were infants at the time of the sale, and until the year 1845, and that the action was brought within twenty years after they arrived at full age. Demurrer sustained.
Held, that the pleadings show that the defendant, by virtue of the sale and conveyance by the administrator, confirmed by the Court, had been in possession six years under color of title, and holding adversely to the plaintiffs; and hence the limitations of §§ 214, 215, 2 R. S. p. 75, are applicable.—*Vancleave et al. v. Milliken*, 105.
2. Where land was sold at sheriff's sale in 1844, though irregularly, it was *held*, that an action to recover it from the purchaser, by the execution-defendant, or any one claiming under him, was barred in ten years; and that, by the R. S. 1852, inchoate dower in such land was abolished.—*Frantz et al. v. Harrow*, 507.

LOGANSPORT INSURANCE COMPANY.

Orders of.]

See PROMISSORY NOTES, 1.

LOST INSTRUMENT.

See EVIDENCE, 9, 12, 13.

M.

MALICIOUS TRESPASS.

1. A criminal prosecution is not a proper mode of trying title to real estate.—*Windsor v. The State*, 375.
2. A person without color of title could not defeat a criminal prosecution, for malicious trespass upon lands, by setting up title in himself; but where he has a paper title, apparently

valid on its face, and claims in good faith to be owner, and is in possession by himself or by another occupying by his direction, a prosecution for a malicious trespass to the damage of a third person, will not lie, although such person, in the end, prove to have the better title.—*Ibid.*

MANSLAUGHTER.

In manslaughter there may be intention to kill, arising in the sudden transport of passion, but it may, and in this grade of offense must, be unaccompanied by malice.—*Dennison v. The State*, 510.

MISJOINDER.

Of Causes and Parties.] See HUSBAND AND WIFE, 3; PRACTICE, 1

MORTGAGE.

1. *Of Real Estate.*—The recovery of a judgment upon one of two notes secured by mortgage, is no waiver or abandonment of the lien upon the mortgaged premises for the amount reduced to judgment, unless the premises are taken in execution; and if they are so taken, but by the interposition of a prior equity, the execution-plaintiff is compelled to abandon his levy, his rights are the same as if no levy had been made.—*Applegate et al. v. Mason*, 75.
2. Where there is a judgment for the sale of the entire mortgaged premises, to satisfy one of several notes, it must appear that the Court inquired whether the land could be sold in parcels, and made provision for the notes not due.—*Cubberly et al. v. Wine*, 353.
3. A mortgagee may recover a judgment for his debt, and yet, under our statute, if he does not take out an execution, he may proceed to foreclose his mortgage.—*Hensicker et ux. v. Lamborn et ux.*, 468.
4. In a judgment for the money due upon a mortgage, where it is payable in installments, and for the sale of the mortgaged property, it should appear that the Court made the inquiry whether the mortgaged land could be sold in parcels, before ordering the sale of the whole.—*Wainscott et ux. v. Silvers*, 497.
5. Where a mortgage is given to secure the payment of a note, and the mortgage contains a waiver of the appraisement law, and the note does not, a judgment of foreclosure and sale without appraisement, in a suit upon the mortgage, is valid, so far, at least, as to the premises embraced in the mortgage.—*Harris v. Makepeace*, 560.
6. The statute requiring the Court to ascertain whether mortgaged premises can be sold in parcels, applies only where there are installments secured by the mortgage yet to become due.—*Ibid.*
7. *Of Chattels.*—Several persons became sureties for A., and to indemnify them A. executed a chattel mortgage to the sureties, jointly. The sureties paid nearly equal sums, and upon the abandonment of the property by A., a part of the sureties brought suit to sell the property to reimburse themselves, making the other sureties defendants. These defendants made default. The Court appointed a receiver to sell the property, and bring the proceeds into Court for distribution. *Held*, that in the distribution, the entire proceeds could not be applied in satisfaction of the amounts paid by the plaintiffs, but that they must be distributed *pro rata* among all the mortgagees.—*Whitehead et al. v. Pitcher et al.*, 141.

See APPRAISEMENT; ASSIGNMENT OF PAPER; JURISDICTION, 2; VENDOR AND PURCHASER, 1, 2.

N.

NEGROES AND MULATTOES.

Information charging that the defendant, on, &c., at, &c., did "unlawfully bring into the state of *Indiana*, and into *Orange* county, a negro woman, whose name is *Polin*, and then and there encouraged said negro woman to remain and continue here," &c.

Held, first, that the bringing into the state was no penal offense.

Second, that the charge of encouragement, though it substantially follows the language of the statute, is too vague. The particular acts of encouragement should be stated.—*Bowles v. The State*, 427.

NEW COUNTIES.

1. The legislature may delegate the power to organize new counties.—*The Board of Comm'rs, &c. v. Spittler*, 235.
2. The act of *March*, 1857, upon this subject, is not in conflict with any provision of the constitution. No legislative power is delegated by that act.—*Ibid*.
3. A single county containing the requisite area, may be divided under the act, by its own board of commissioners, acting through a single committee of freeholders.—*Ibid*.
4. The Courts will take notice judicially of the area of an established county.—*Ibid*.
5. A writ of prohibition will not be granted to prevent a county board from entering an order for the establishment of a new county, under the act of *May*, 1857. An appeal is the proper remedy.—*Ibid*.

NEW TRIAL.

1. *Quere*, whether the fact, that a juror sitting upon a trial is not a householder, is sufficient ground for a new trial, where the party asking the new trial was ignorant of the fact at the trial.—*The Lafayette, &c., Plankroad Co. v. The New Albany, &c., Railroad Co.*, 90.
2. The fact that a juror sitting upon a trial is ignorant of the *English* language, is sufficient ground for granting a new trial.—*Ibid*.
3. The failure to examine the juror upon this point before accepting him, cannot be imputed as negligence. It may be presumed that the officer has called a jury competent in this respect.—*Ibid*.
4. The fact of such incompetence may be proven by the juror's statement under oath, without a violation of the rule that jurors are incompetent to impeach their verdicts.—*Ibid*.
5. A demurrer to a complaint for a new trial, stating that the complaint "does not contain and set forth sufficient facts to enable the plaintiffs to sustain said action," though not strictly formal, is substantially sufficient.—*Stanley et al. v. Peeples et al.*, 232.
6. An application for a new trial may be made by complaint, where the cause for the application is discovered after the term at which the decision was rendered; but the cause thus discovered must have had an existence at the time of the decision.—*Ibid*.
7. To entitle a party to a new trial after the term, he must show sufficient matter to have entitled him to a new trial if applied for in term.—*Ibid*.
8. Error in the judgment upon the original complaint, is not a sufficient cause for a new trial after term. It is too general; it does not show wherein the errors consisted, nor that they were unknown to the party during term.—*Ibid*.

See APPEAL, 6; BASTARDY, 2; EVIDENCE, 8; JUSTICE OF THE PEACE, 1; PRACTICE, 6, 16.

NON-RESIDENT.

See COSTS, 5, 6.

NOTICE.

Of Assignment of Note.]
By Surety to Sue Maker.]

See GARNISHMENT, 1, 2.
See PROMISSORY NOTES, 7.
See DEPOSITIONS.

O.

OFFICE.

A suit for an injunction, is not the remedy for obtaining possession of an office to which a person has been elected, and from which he is illegally excluded by an usurper.—*Markle v. Wright*, 548.

See OFFICIAL BOND.

OFFICIAL BOND.

1. Under the statute of 1843, a suit might be maintained upon an official bond which had not been properly approved by the county board, if the defect was properly suggested in the pleadings.—*Cook et al. v. The State ex rel. Patterson*, 154.
2. A copy of the bond and the defective approval filed with, and made part of, the complaint, is a sufficient suggestion of such defect.—*Ibid.*
3. Suit upon the official bond of a county treasurer. The condition of the bond was, that the treasurer should pay over, according to law, all money that should come into his hands. The Court instructed the jury as follows: "If *Cook*, at the expiration of his first term, was a defaulter, and, being his own successor, used funds that came to his hands during his second term, to pay the balance against him at the end of his first term, the sureties in the first bond are discharged, and the sureties in the second bond are liable for the money thus appropriated." *Held*, that the instruction was correct.—*Ibid.*
4. Where a constable attached certain property and placed it in the keeping of *A.*, and taxed the expense of keeping it with the costs, and collected the amount, but failed to pay it over to *A.*, it was *held*, that *A.* could not have an action upon his bond to recover it.—*Wilson et al. v. The State ex rel. Lashley*, 341.

OPEN AND CLOSE.

See PRACTICE, 4.

P.

PARENT AND CHILD.

If a father conveys his farm to a child in consideration of an obligation to support himself and wife during life, the obligation is valid. So, such an obligation may be valid on an advancement of money.—*Leddy v. Crumbaker et al.*, 523.

See DIVORCE, 6; INFANCY, 2, 3.

PARTIES.

See APPEAL, 10.

PARTNERSHIP.

1. After the dissolution of a partnership by the death of one of its members, its property, both real and personal, is subject to the trust of paying the debts of the firm, in the hands of a surviving member thereof.—*Holland et al. v. Fuller et al.*, 195.
2. *A.* and *B.* indorsed the paper of the firm of *C.* and *D.* in a large sum, which remained unpaid at the dissolution of the firm by the death of *C.* They subsequently indorsed the individual paper of *D.* in a large amount, upon their faith in his ability and honesty alone. With the proceeds of such individual paper, *D.* paid off the partnership paper upon which they were liable, but without any arrangement with them to that effect. *D.* then failed, and assigned to *A.* and *B.* all his individual property, and certain town lots belonging to the firm of *C.* and *D.* Without these lots, there was not sufficient property in the assignment to pay the debts which *A.* and *B.*, by reason of their indorsement, had paid for *D.* *E.*, *F.*, and others, the only creditors of the firm of *C.* and *D.* whose debts remained unpaid, having obtained judgments, brought this suit to set aside the assignment so far as the lots in question are concerned, and to subject them to the payment of their judgments. *Held*, that *A.* and *B.* were not, under the circumstances, entitled to be substituted in place of the original creditors of the firm. *Held*, further, that the assignment of the lots in question, was void; and that a judgment ordering them to be sold, and the proceeds applied to the payment of the firm debts, was right.—*Ibid.*
3. It is not necessary to obtain a judgment against an insolvent partner, before proceeding against equitable assets belonging to the estate of a deceased partner.—*Vance v. Cowing et al.*, 460.
4. In actions commenced before a justice, in favor of a firm, it is sufficient if the names of the individuals composing the firm appear in the record; and if such suit be upon a note given to the firm, the partnership need not be proved unless the partnership, or the cause of action be denied under oath.—*Hauser v. Smith et al.*, 532.

See ATTACHMENT, 1, 2; FRAUDS, STATUTE OF, 6.

PASSENGERS.

See RAILROAD COMPANY, 3.

PATENTS.

A deed for a patented improvement described the improvement as "*Richard E. Schroeder's* day of *May*, 1851, securing to him," &c. *Held*, a sufficient description of the thing sold.—patent for an improvement for burning lime, for which letters patent were granted on the 6th *Hill et al. v. Thuermer*, 351.

PAYMENT.

Spit upon a promissory note, dated *May* 28, 1857. Issues upon answers of payment and set-off. The note and a receipt "in full of book accounts up to date" (*May* 28, 1857), were the only evidence. The items of set-off were payments made by defendant as replevin bail for plaintiff in 1839 and 1840. *Held*, that the evidence raised a presumption of payment of the matters of set-off.—*Coon v. Brown*, 150.

To whom.]

See BILLS OF EXCHANGE.

See EVIDENCE, 1.

PERJURY.

See SLANDER.

PERPETUITIES.

See WILL, 9.

PLEADING.

1. The rule that when a pleading is founded upon a written instrument, the original, or a copy thereof, must be filed with the pleading, is imperative.—*Price v. The Grand Rapids, &c., Railroad Co.*, 58.
2. Thus, if a complaint founded upon a written instrument fail to aver that a copy has been filed, it cannot be assumed that it sets forth a sufficient cause of action; and the defect may be reached upon demurrer to the answer.—*Ibid.*
3. Where a general denial is pleaded, a further answer of *nul tiel record* is surplusage, bad on demurrer, and may be rejected on motion.—*Westcott v. Brown*, 83.
4. If, in a suit founded upon a transcript of a judgment of a Court of general jurisdiction of a foreign state, the record, properly authenticated and filed as a part of the complaint, alleges personal service of process upon the defendant, he will not be permitted to controvert the allegation in his answer.—*Ibid.*
5. A general answer of failure of consideration is bad.—*Smith v. Baxter et al.*, 151.
6. In a suit upon a promissory note, an answer that certain articles forming a part of the consideration of the note, were injured, broken, and of no value, is bad, without an allegation of fraud or warranty.—*Ibid.*
7. And if the answer aver that certain articles, part of the consideration, were never received, or are lost and wanting, it must also be alleged that the failure to receive the articles, or their loss, was through the fault of the plaintiff.—*Ibid.*
8. A defense purporting to go to the whole complaint, but answering only a part of it, is bad.—*Ibid.*
9. Where a paragraph of an answer does not purport to plead a set-off, and the facts pleaded do not show a liability of the plaintiff to the defendant, it cannot be treated as a set-off.—*Ibid.*
10. Where the plaintiff demurs to the answer, but, before the Court has determined the demurrer, replies thereto, he thereby waives his demurrer.—*Bell et al. v. Hungate*, 382.
11. Suit before a justice of the peace. Appeal to the Common Pleas. Two trials were had in the Common Pleas, in which the jury failed to agree, after which the Court permitted the plaintiff to file a complaint to which an affidavit was attached, by the attorney of the plaintiff, stating that it was "in substance the same as that filed before the justice," &c. The record did not contain the original complaint, nor show any reason for filing the new one. A motion was made by the defendant, and overruled, to reject the new complaint. *Held*, that 'as our new code of procedure appears to have been framed upon the notion that it was proper to dispense with mere form as much as possible, and as the affidavit avers that the complaint filed is substantially the same as the original one, we think it a sufficient compliance with the statute (2 R. S. p. 46), which provides that "if an original paper or pleading be lost, or withheld by any person, the Court may authorize a copy thereof to be filed, and used instead of the original." This Court, in the absence of a reason for permitting the filing, will presume in favor of the order of the Court.—*Dasher v. Parks*, 894.
12. A demurrer was then filed to the complaint and overruled. The averments are that plaintiff purchased of defendant on, &c., four head of fat cattle, at, &c., and advanced, as part payment thereon, 50 dollars; that said cattle were to be delivered to the plaintiff at *Peru*, on, &c.; that defendant did not deliver them at, &c., but had failed and refused so to do; nor had he paid, or offered to pay, said 50 dollars, &c. There is no averment that the plaintiff was ready, at the time and place, to receive and pay for the said cattle; and, for

that reason, it was insisted that the complaint was insufficient. *Held*, that the demurrer was properly overruled; that the complaint was sufficient, before a justice, to recover the sum advanced and its interest.—*Ibid*.

13. A defect in the complaint for want of verification cannot be reached by a demurrer assigning for cause that the complaint does not state facts sufficient, &c., if, indeed, it can be reached at all by demurrer. Such defects do not seem to be embraced in any of the statutory causes for demurrer; and if, in such case, a verification and bond be filed after the trial, the defendant cannot complain.—*Denny et al. v. Moore*, 418.
14. A motion to set aside the complaint, or stay the proceedings, would perhaps be the correct practice.—*Ibid*.
15. When a demurrer specifically points out the causes upon which the party relies, it cannot be enlarged to embrace other causes.—*Vance v. Cowing et al.*, 460.
16. Repugnancy of allegations is not a ground of demurrer under the code.—*Forst v. Elston et al.*, 482.
17. A reply, denying each and every allegation in all the paragraphs of an answer, is good.—*Cleveland et al. v. Worrell*, 545.

See EVIDENCE, 3; INJUNCTION; INSURANCE; NEW TRIAL, 5, 6; PRACTICE, 4, 5, 17; PROMISSORY NOTES, 2, 3, 4, 8 to 11, 18; RECOGNIZANCE, 1, 4; REPLEVIN 1; SET-OFF; SETTLEMENT OF DECEDENTS' ESTATES, 1; SUBSCRIPTION OF STOCK, 1, 2.

POSSESSION.

See LANDLORD AND TENANT, 2, 3, 6; VENDOR AND PURCHASER.

PRACTICE.

1. Although a judgment cannot be reversed for a misjoinder of causes, and will not be reversed for a misjoinder of parties curable by amendment, yet if from both, an incurable error intervenes, the judgment will be reversed.—*Tobin et ux. v. Connery et ux.*, 65.
2. The judgment in this case was reversed, and the cause remanded for another trial, on the ground that the case was not properly put to the jury, and the Supreme Court was not satisfied that injustice had not been done.—*The Pittsburgh, &c., Railroad Co. v. Karns*, 87.
3. Where nothing was claimed upon a paragraph of a complaint, and no evidence was offered in support of it, a trial without an issue upon it will not authorize a reversal of the judgment.—*Hipes v. Cochran*, 175.
4. Where the defendant withdrew the general denial, and was thereupon permitted to open the case, and all the evidence offered by him being rejected, the plaintiff was permitted to present his evidence, it was contended that this was error, as there was nothing to rebut. But another paragraph of the answer traversed every part of the complaint not confessed and avoided. There were material allegations neither confessed nor avoided. *Held*, that the defendant was not entitled to open the case, he not having the affirmative of the issue.—*Burroughs et al. v. Hunt*, 178.
5. The defendant offered to withdraw a paragraph of his answer, upon the condition that the evidence applicable to it should be stricken out. This was refused. *Held*, that the refusal was within the discretion of the Court.—*Ibid*.
6. Where an exception has been properly taken to a ruling on a demurrer, no motion for a new trial is necessary.—*Tucker v. The State ex rel. Gray*, 332.
7. The note of the clerk of the Court below upon the transcript, is no part of the record.—*Black et al. v. Daggy*, 383.
8. The Supreme Court will presume in favor of the legality of the proceedings below, where the contrary is not shown by the party complaining thereof.—*Ibid*.
9. Where the record does not contain the evidence, the Supreme Court will presume in favor

of the impropriety of an instruction, if any state of facts might have existed to which such instruction would have been applicable.—*Ibid.*

10. Where there was no motion below for a taxation of costs, it was *held*, that the Court not having been asked to make a ruling on the subject, there was nothing to complain of on appeal.—*Lindley v. Dakin*, 388.
11. Where the record stated that it contained "all the testimony," it was *held*, that it could not be deemed to contain all the evidence.—*Ibid.*
12. An objection that no default was taken against nominal defendants, and no issue joined, cannot be raised for the first time in the Supreme Court.—*Denny et al. v. Moore*, 418.
13. A party cannot, after having the full benefit of a judgment as a set-off, complain, on appeal, that in his notice of set-off, the judgment was misdescribed, if no advantage was taken of the misdescription.—*Ibid.*
14. A defendant constructively summoned has a right to appear and defend at any time before final judgment in the cause.—*Crews et al. v. Cleghorn et al.*, 438.
15. The appellee must assign cross errors if he seeks to have them noticed in the appellate Court.—*Nutter v. The Junction Railroad Co.*, 479.
16. Where a verdict of a jury rests in calculation, and they find excessive damages, a new trial may be granted, if asked for, for such cause, and no remittitur is offered.—*Ibid.*
17. Where a demurrer is sustained to an answer, the Court, if the defendant does not ask leave to amend, may proceed to judgment for the plaintiff.—*Giles v. Gullion*, 487.

See ADJOURNMENT; APPEAL; APPEARANCE; CONTINUANCE; DEFAULT; DISCONTINUANCE; DISMISSAL; DIVORCE, 5; ERROR; EVIDENCE, 8; EXCEPTIONS; JUDGMENT BY CONFESSION; JURY; NEW TRIAL; PLEADING, 13; PROCESS; RECOGNIZANCE; VENUE; VERDICT.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

A suit under the statute regulating proceedings supplementary to execution, is not a proper mode of setting aside an illegal sale.—*Witherow et al. v. Higgins*, 440.

PROCESS.

1. The provision of the Revised Statutes, that process cannot run less than three nor more than thirty days (2 R. S. p. 454), the provision of the act of 1853, that in suits before a justice of the peace, against a railroad company, for stock killed, a day should be fixed for trial without specifying within what time, and that at least ten days' notice thereof should be given by summons (Acts of 1853, p. 113), and the provision of the act of the same year, that where the principal office of the company is out of the state, at least thirty days' notice shall be given of the time and place of the pendency of suit (Acts of 1853, p. 102), should be construed together; and in every summons the day of trial should be set not exceeding thirty days after the date of the summons.—*The Michigan, &c., Railroad Co. v. Shannon*, 171.
2. In cases before a justice of the peace, where service is too late for the day of trial named, it is the duty of the justice, under the code, if want of sufficient service be not waived, to continue the cause to a future day, not unreasonably distant.—*Ibid.*
3. Upon such service, therefore, though a judgment by default cannot be rendered till the statutory time of notice has expired, still the service operates to inform the party of the pendency of the suit, and he is bound to take notice of the subsequent action of the Court therein.—*Ibid.*
4. Where service upon a railroad company having their principal office out of the state, in an

action before a justice for killing stock, had been made ten days, and nothing appeared showing the justice that the case was not ready for judgment, and judgment was rendered upon such insufficient notice, it was *held*, that the defendants might have the judgment opened, on application, in ten days, or they might have it vacated in a direct proceeding at any time after ten days and before payment, or they might appeal. But it was *held*, also, that the case could not be dismissed on appeal; because the insufficient service was not ground of dismissal, but only of a continuance, before the justice; nor would the fact be ground of continuance on appeal, for a continuance in that Court would be granted or not, as cause might be shown then and there to exist.—*Ibid*.

5. Where the summons commanded the officer to summon the *New Albany, &c., Railroad Company*, and the return was, "served as commanded, by copy given to conductor P., conductor on express train," it was *held*, in a suit for killing stock, brought under the statute of 1853, that service was sufficiently shown.—*The New Albany, &c., Railroad Co. v. Powell*, 373.
6. A party may waive the reading of a summons by the officer, in making service of it; and if he does, understanding the nature and object of the writ, the service is good without reading.—*Casteel v. Hiday*, 536.
7. A writ may be made returnable on the second day of the term.—*Davis et al. v. Pike*, 379; *Trittip et al. v. Talbott et al.*, 544.

When defects waived.]

See APPEARANCE, 2.

Service of, when not controvertible.]

See PLEADING, 4.

PROHIBITION.

1. For the causes for which a writ of prohibition may be allowed, the Courts must look to the common law.—*The Board of Comm'rs, &c., v. Spittler*, 235.
2. Under our system of procedure, the writ can only be used "to command the judge and parties of a suit in an inferior Court, to cease the prosecution thereof, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court."—*Ibid*.

See NEW COUNTIES, 5.

PROMISSORY NOTES.

1. Suit upon a promissory note. One of the defendants, as treasurer of the *Logansport Insurance Company*, had drawn certain orders upon the company, in the similitude of bank notes, and intended for circulation as such, which were accepted by the secretary of the company. The following is a sample: "*Logansport Insurance Company*: Pay one dollar on demand to the bearer. *Logansport, May 1, 1850.*" The orders were circulated as money. The treasurer requested the plaintiff to redeem the orders, and promised to pay him the amount he might redeem. But when the plaintiff had redeemed orders to the amount of 800 dollars, the treasurer, not being prepared to pay, gave the note in suit. General verdict for the plaintiff, together with the following answers: "Question—'Was said note given at the date thereof, for and in consideration of the surrender, by the plaintiff to the defendant, of 800 dollars, the amount of the issues or circulation of the *Logansport Insurance Company*?' Answer—'Yes.' Question—'Was the issue of the currency of the *Logansport Insurance Company* fraudulent and void?' Answer—'Yes.' Question—'Did the plaintiff redeem and take up 800 dollars of the issues or circulation of said company, at the request of the defendant, and upon his promise to reimburse the plaintiff?' Answer—'Yes.'"

Held, first, that the special findings are consistent with the general verdict, and the judgment right upon the facts stated, if the plaintiff could recover at all.

Second, that the consideration of the note was legal, and the plaintiff was entitled to recover.

—*Wright et al. v. Hughes*, 109.

2. By our statute (1 R. S. p. 379, § 16), a suit may be instituted by an indorsee against the immediate and remote indorsers, jointly.—*Marshall v. Pyeatt*, 255.

3. If the complaint, in such case, to show failure of consideration, allege that the defendants had due notice of the suit against the maker, a paragraph of the answer traversing the allegation, is good.—*Ibid*.

4. But a paragraph charging that, by agreement with the maker, the plaintiff fraudulently put off the trial from term to term, without notice to the defendants, and without their knowledge or consent, by means whereof the defendant lost the benefit of the assignment to him, &c., was *held* bad, as being inapplicable to the case made by the complaint.—*Ibid*.

5. Though, as a general rule, an indorsee of a promissory note assignable under the statute, cannot recover against the indorser unless he has used diligence against the maker, yet he may allege and prove an excuse for lack of diligence.—*Ibid*.

6. Suit upon a promissory note given by A., with B. as surety, to C., dated *October 13, 1855*, payable one day after date. The answer of B. showed that at the time the note was executed, A. and C. entered into a contract by which A. was to erect for C. a certain building, to be completed by the 1st of *November, 1856*. The agreement fixed the amount to be paid, &c. The last clause of it is as follows: "5th. As to the balance, 2,000 dollars, it is agreed as follows: Said C. herewith advances to said A., as and for a loan on the note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building as in this contract is provided; and which note, also, shall not become or be payable so long as said A. shall progress with the preparation of materials, and with the erection of said building, so as to warrant the said superintendent in the reasonable expectation of the progress and completion of the work, as is hereinbefore provided. *October 13, 1855*." Signed by A., by B. as surety, and by C. The answer further shows that on the 5th of *June, 1856*, the following further agreement was made, without the knowledge or consent of B., to-wit: that said A. and one D. should, by the 1st day of *November, 1856*, put an additional story on the building then under contract between A. and C., for the further consideration of 1,700 dollars, to be paid on the completion thereof. *Held*, that the second contract was such an alteration of the first, as to discharge the surety.—*Zimmerman v. Judah*, 286.

7. In 1852, A. made his note payable to B. in 1853, upon which C. became surety. In 1856, C. gave B. written notice to sue on the note. A. had then left the state, and he never returned to it, but died in *Ohio*. He left no property, and never had any administrator in *Indiana*. B. did not commence suit against any one on the note, at the first term of the Court after receiving notice to sue; but at the second term thereafter, he sued C. C. defended on the ground that he, himself, had not been sued at the first term after the notice, and his defense was held valid by the Court. *Held*: The Court erred. The notice to sue did not operate as a requirement to sue the surety. No suit against him was necessary to secure any rights against his principal. He could have paid the note at any time without suit, and then proceeded against his principal. And the payee of the note was not bound, upon notice, to follow the principal out of the state. This is the rule as to diligence, on assigned notes. So such absence excuses a demand, in cases where a demand would otherwise be necessary.—*Rowe v. Buchtel*, 381.

8. Suit upon a promissory note. The defendants answered, setting up a failure of consideration, in this, that J. C., and E. J. C., his wife, were the equal owners, as joint [tenants],

of a tract of land; that they united in the sale of it to *C. B.*, one of the makers of the note sued on (*S.* being his surety), and made a joint deed for the same; that, for the consideration, *B.* gave 800 dollars cash in hand, and the note above sued on, which, for certain personal reasons, the answer alleges, was made payable to the wife of *J. C.*, though it avers the same to be the joint property of the two; that, at the same time, and as a part of the contract, said *J. C.* and wife executed to him, said *B.*, their joint bond of indemnity against the failure of the title to any of the land deeded; that subsequently *J. C.*'s interest in the land was sold on execution against him, and the defendant's, *B.*'s title, thereby divested. A demurrer was sustained. *Held*, that the answer showed a failure of consideration, at least, to a part, if not all of the note.—*Bevins et al. v. Prather*, 392.

9. In a suit upon a promissory note, a defense seeking to avoid the entire contract for usury, without showing what amount of illegal interest it includes, is bad.—*Collins v. Makepeace*, 448.
10. Where the complaint counted upon a note and an account stated, a defense alleging that the note was given by the defendant, and received by the plaintiff, in payment of the account, was *held* good, although it also charged an alteration of the note, and was not verified by oath.—*Ibid.*
11. Suit upon a promissory note. Answer as follows: "Defendant admits that he executed the note filed with, and referred to in the first count of the complaint; but he avers that after its execution and delivery, the same was altered without his consent or knowledge, in this: '20' before 'day' was changed to '22;' the word '*August*' was stricken out, and the word '*March*' written above it, which has also been obliterated. So the defendant did not execute said note as it now is filed with said Court, and shown to him." This defense was verified by oath. And the plaintiff replied thus: "Said note was not made payable on the 20th day of *August*, 1853, as in the second paragraph alleged; but was made payable on the 22d day of *August*, by the draftsman, *S.*, through inadvertence—it being, at the time of making the note, expressly understood between the parties that a judgment should be taken at the term of the Court then in session, upon the note. And upon discovering that, owing to the time he, *S.*, had made the note payable, such judgment could not then be taken, and still having the same note in his possession, he struck out the word '*August*' without the knowledge or consent of the plaintiff, of which he immediately notified the defendant, who objected to such alteration being made, whereupon he, *S.*, at the request of the defendant, then and there struck out the word '*March*' and restored the word '*August*,' as written at the time the note was executed, with which the defendant then and there expressed himself satisfied, and agreed to the note being then as it originally stood." *Held*, that the reply was good.—*Ibid.*
12. Time given to the principal in a promissory note upon a usurious contract, without the consent of the surety, does not discharge the surety.—*Goodhue v. Palmer*, 457.
13. But the surety, in a suit against him, may set off the amount of usurious interest paid by the principal.—*Ibid.*
14. Where interrogatories sought to elicit proof that the note was given, not without consideration, but in consideration of a horse sold and delivered by the plaintiff to another joint maker of the note, before the making thereof, they were *held* to have been properly set aside as irrelevant.—*Druley v. Hendricks*, 478.
15. A promissory note, and the contract in writing out of which it arises, if both are executed at the same time, constitute but one agreement; and that agreement cannot, as a general rule, be varied or its terms added to by parol evidence.—*Allen et al. v. Nofsinger*, 494.
16. A promissory note payable at a bank out of this state is not governed by the law merchant, but a bill of exchange is.—*Mix et al. v. The State Bank*, 521.

17. As a general rule, a joint suit cannot be maintained against the maker and assignor of a promissory note not governed by the law merchant; but facts which will excuse a prior suit against the maker before resorting to the assignor, may justify such joint suit.—*Ibid.*
 18. Suit on a note. Answer, among other things, a release by said plaintiffs in writing, &c., which is lost, &c. Reply in denial. Demurrer to the reply, on the ground that it was not sworn to, overruled. *Held*, that there was no error.—*McNeer et al. v. Dipboy*, 542.
 19. Credits wrongfully made upon a promissory note, may properly be obliterated.—*Burch v. Dent*, 542.
 20. Where a promissory note is indorsed by the payee, whose name is followed upon the back of the note by other names in blank, parol evidence will not be permitted to vary the legal effect of the indorsements thus appearing upon the note.—*Vore et al. v. Hurst*, 551.
 21. *Conwell v. Pumphrey*, 9 Ind. R. 135, adhered to.—*Cutchen et al. v. Coleman*, 568.
- Assumption and Guaranty of.*] See BOND, 1.
- See APPRAISEMENT; ASSIGNMENT OF PAPER; BILLS OF EXCHANGE; EVIDENCE, 11, 12, 13; GARNISHMENT; PAYMENT; PLEADING, 5, 6, 7; SET-OFF, 1, 2.

PURCHASE-MONEY.

See VENDOR AND PURCHASER.

R.

RAILROAD COMPANIES.

1. Where a team was frightened by the starting of a railroad engine, ran away, and in endeavoring to stop it, the driver was thrown under the wheel of the wagon and had his leg broken—both the driver and the agents of the company being engaged in lawful pursuits—it was *held* that if the accident occurred through negligence on the part of the company, and the negligence of the driver did not proximately contribute to it, he might recover; but not if negligence on the part of the driver concurred to produce it, or if it occurred entirely through his own negligence.—*The Pittsburgh, &c., Railroad Co. v. Karns*, 87.
2. Suit against a railroad company to recover for cattle killed by their engines. The right to recover was rested on the following facts: Near where the stock was killed, was a small brook, over which the company had built a culvert. Below the culvert the plaintiff had a pasture in which he kept his cattle. Across the brook, below the culvert, he had made a fence of long poles. A flood came and floated driftwood through the culvert, against the fence. To prevent the accumulation of drift above the culvert in such quantities as to endanger its safety, the company aided in its passage. At sunset, the plaintiff knew the exposed situation of his fence, but would not remove his cattle. At night, the fence being borne away, the cattle passed upon the road and were killed. *Held*, that the plaintiff could not recover.—*The Indianapolis, &c., Railroad Co. v. Wright*, 213.
3. The plaintiff, without having procured a ticket, was crossing a side track of a railroad, in the night, to get upon a passenger train at its usual place of stopping, on the main track; but by the negligence of the employes of the company, a switch had been left open, and the train was thrown upon the side track, and ran against the plaintiff and broke his leg. *Held*, first, that he was not a passenger at the time of the injury. Second, that he had the same right to cross the side track as he did, that persons have to cross a railroad upon a public street or highway. Third, that the company having the legal right to run their train upon the side track, it is immaterial whether it was run upon that track by accident or design, if run with due care. No

greater care would be required in case of such accident than if the train were thrown upon the track by design.

Fourth, that if the train, in running up on the side track, was managed with due care, the plaintiff cannot recover.—*The Indiana, &c., Railway Co. v. Hudelson*, 325.

4. A railroad company are not liable, so far as the simple question of negligence is concerned, to the parents, guardians, or representatives of a servant killed upon the road, where they would not have been liable to such person, had he been injured, simply, and not killed.—*The Ohio, &c., Railroad Co. v. Tindall*, 366.

5. An employer is not liable to one employè for an injury occasioned by another engaged in the same general undertaking.—*Ibid.*

6. A set of hands were at work for a railroad company gravelling a part of the track. The gravel was conveyed from the pit to the place where it was used, by a train of cars. The same hands loaded and unloaded the gravel, and rode back and forth upon the cars from the places of loading and discharging. While thus employed, the train, through the alleged carelessness of the engineer, ran against an ox, was thrown off the track, and one of the hands, a young man under age, killed. *Held*, that the engineer and the deceased were engaged in the same general undertaking, and the representative of the deceased could not recover damages.—*Ibid.*

7. This case is distinguishable from *Fitzpatrick v. The New Albany, &c., Railroad Co.*, 7 Ind. R. 436, and does not impair the force of that case.—*Ibid.*

8. In this case, the Court instructed the jury that, in estimating the damages, they might take into consideration the actual pecuniary loss to the plaintiff occasioned by the death of the son and servant, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness. *Held*, that this was error.—*Ibid.*

9. Where, in the organization of a railroad company, all the requirements of the charter were observed, though not in the order prescribed, the organization was deemed sufficient.—*Eakright v. The Logansport, &c., Railroad Co.*, 404.

10. Where the charter required that the directors should be named in the articles of association, it was *held* a compliance with the requirement to adopt the articles at the time of electing the directors. But, *held*, also, that the requirement was only directory.—*Ibid.*

11. The fact of an illegal election of directors, cannot be set up in resistance of payment of stock.—*Ibid.*

12. The articles of association (see opinion) sufficiently show the name of the place from which the proposed road was to be constructed.—*Ibid.*

13. *Smith v. The Indiana, &c., Railroad Co.*, 12 Ind. R. 61, followed.—*Ibid.*

14. The defendant, in a suit upon a subscription to the original stock of a railroad company, cannot demand inspection of the articles of association subscribed by him and sued upon, on file in the office of the secretary of state.—*Ibid.*

15. Nor can he show by *pistol* that he would not have subscribed, if he had supposed a particular route would be adopted.—*Ibid.*

16. Representations of officers with whom the power of locating the route is not lodged, will not bind the company as to the location; and even the representations of those who have that power, are matters of opinion, upon which the subscriber has no right to rely, where, by the legal effect of the subscription, the entire consideration of his promise was the shares subscribed for.—*Ibid.*

17. It makes no difference, so far as the rights of a railroad company are concerned, by whom the fences along their track are built. But the company are bound to keep such fences in repair, no matter by whom built. The construction of cattle-pits is fairly embraced under the term *fence*.—*The New Albany, &c., Railroad Co. v. Pace*, 411.

18. In a suit against a railroad to recover for stock killed, the allegation that the road was

not fenced is a material one, and must be proved, where such fact is an element in the right to recover.—*The Indianapolis, &c., Railroad Co., v. Wharton*, 509.

Sub-contractors of.] See *The Lake Erie, &c., Railroad Co., v. Eckler et al.*, 67.

Bonds of.] See COMMERCIAL PAPER.

See CARRIERS; INFANCY, 2; PROCESS, 1 to 5; SUBSCRIPTION OF STOCK.

RECEIPT.

See EVIDENCE, 4.

RECOGNIZANCE.

1. Where an action is founded upon a recognizance, a copy of the recognizance must be filed with the complaint.—*Kiser v. The State*, 80.
2. If a recognizor fail to appear at the term to which he is recognized, and forfeiture is not then taken, it cannot be taken at a subsequent term.—*Ibid.*
3. The recognizance, in such case, is inoperative, and the bail discharged.—*Ibid.*
4. Complaint upon a recognizance, alleging that the recognizance was taken by the sheriff in *December*, and was conditioned that the principal therein should be and appear, &c., at the next term of the Common Pleas Court thereafter, &c. It does not show what was done at the next term of the Court—whether the defendant appeared or not, or whether the case was continued or not; but then avers that, at the *August* term, he was called and defaulted. *Held*, bad.—*Tucker v. The State ex rel. Gray*, 332.

RECORD ON APPEAL.

See PRACTICE, 7, 9, 11.

REMITTITUR.

See PRACTICE, 16.

RENT.

See LANDLORD AND TENANT, 5.

REPAIRS.

See LANDLORD AND TENANT, 4, 5.

REPLEVIN.

1. In an action to recover personal property, a complaint sworn to, may constitute a complaint and an affidavit.—*Stephens v. Scott*, 515.
2. In such an action, a verdict that the plaintiff recover the property with one cent damages for its detention, is good.—*Ibid.*

See JUSTICE OF THE PEACE, 2.

REPLEVIN BAIL.

Under the R. S. of 1838, a replevin bail was required to obtain a judgment before he could have an execution; but he might have judgment on motion, when the original judgment was rendered.—*Coon v. Brown*, 150.

REPRESENTATIONS.

1. The proprietor of city lots induced certain parties to purchase them, by representing, *inter alia*, that he had sold certain other lots in the neighborhood at a certain price, whereas, in fact, he had sold the lots for much less. *Held*, that the representation was sufficient ground for rescission of the contract.—*Kertz et al. v. Dunlop*, 277.
2. A false representation that a street was to be laid out by A., which would afford direct and convenient access to the lots, was *held* to be equally material as to subject-matter, though perhaps not sufficiently specific in its terms.—*Ibid*.
3. This case is distinguished from *Cronk v. Cole*, 10 Ind. R. 485, and *Barton v. Simmons*, at the present term.—*Ibid*.

See RAILROAD COMPANY, 16.

RIOT.

See CRIMINAL LAW, 12.

ROBBERY.

1. An indictment for robbery alleged that on, &c., at, &c., the said, &c., did commit an assault, &c., and did then and there unlawfully, forcibly, and feloniously take from the person of him, the said, &c., one, &c., of the personal goods of him, the said, &c., by violence to the person of him, the said, &c., and by putting him in fear. *Held*, sufficient without alleging that the taking was against the will of the person robbed.—*Terry v. The State*, 70.
2. The indictment described the property thus: "One pocket-book of the value of fifty cents, one bank note of the value of ten dollars, one bank note of the value of five dollars, one piece of gold coin, of *American* coinage, of the value of five dollars." *Held*, that the description was sufficient.—*Ibid*.
3. No more particularity in the description of the property is required in an indictment for robbery than in an indictment for larceny.—*Ibid*.
4. An indictment for robbery need not allege a carrying away.—*Ibid*.

S.

SALE.

"*Connersville, Indiana, September 20, 1856.* Articles of agreement, made this day and date above, witness, that *J. W. Saucer* has this day bought the entire stock in trade of the firm of *J. Saucer & Co.*, and does agree to take all the stock on hand, and, also, all of the accounts due the firm, and become liable for all of the claims which are against the said firm, and release the said *A. M. Davis* from all liabilities that the said firm is liable for at this date. [Signed] *J. W. Saucer* [seal]. *A. M. Davis* [seal]." *Held*, that all such accounts as were due the firm, in their regular course of dealing, were by the above instrument transferred, at least equitably, to the purchaser.—*Heron et al. v. Saucer*, 148.

Setting aside Illegal.] See PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

SEDUCTION.

1. In an action for seduction, the general character for chastity of the person seduced, is in issue, and may be impeached or supported by general evidence; but she cannot be asked whether she had not been previously criminal with other men. But other persons may be called upon to testify as to their own criminal intercourse with her, and the time and place.—*Shattuck v. Myers*, 46.

2. The question of character is involved in the question of the amount of damages; and, therefore, evidence of the character and the acts of the female seduced, is admissible, which would not be proper as to any other witness.—*Ibid.*

SET-OFF.

1. Suit by the appellees against the appellants, on a note made by the appellants to one W., and by him indorsed to the plaintiffs. Each of the defendants answered separately, setting up as a set-off an indebtedness due to himself from W., accruing before the assignment of the note. Demurrer sustained. *Held*, that the set-off pleaded, lacked the essential quality of mutuality. Each answer set up matters due to only one of the makers of the note, and in such case they cannot be set-off.—*Booe et al. v. Watson et al.*, 387.
2. The statute authorizing the principal, in a note made by a principal and surety, to set up as an offset a claim due to himself from the payee, &c., does not apply here, as there is no averment that one of the makers is a principal, and the other a surety. If one of the makers of the note were a principal, and the other his surety merely, whereby a debt due from the payee or holder to the principal, could be set-off, that fact should be averred in the answer setting up the offset.—*Ibid.*
3. A prior suit pending for a set-off, would prevent its being pleaded to a subsequent.—*Snodgrass v. Smith*, 393.

See EXECUTORS AND ADMINISTRATORS, 2; PAYMENT; PLEADING, 9; PRACTICE, 13.

SETTLEMENT OF DECEDENTS' ESTATES.

1. The statement of a claim against a decedent's estate need not be a regular complaint under the ordinary rules of pleading; but is sufficient if it shows the nature and amount of the demand, and enough to bar another action therefor.—*Hannum v. Curtis*, 206.
2. The code authorizes a final settlement to be set aside for fraud, on the application of any one interested. Fraud in the inventory may affect the final settlement with fraud, and will cause it to be set aside.—*West et al. v. Reavis et al.*, 294.
3. Claim in the form of an itemized account against the estate of T. It appears to be for one-half a certain warehouse lot, and half the improvements thereon. No averments, or complaint, other than such claim, were filed. *Held*: The inference is, that the claim was in favor of a surviving partner or joint owner, against the estate of the deceased partner or joint owner; that being the fact, the claim does not amount to a succinct statement as required by the statute. It does not show sufficiently the character of the claim, or bill, as it is termed, nor that it had been paid by the surviving partner or joint owner. For aught that appears, the estate will continue liable to the various persons named, as having furnished materials and labor for said building, although such claim should be paid to the plaintiff.—*Thompson v. Ristine*, 459.

See EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD, 3.

SHERIFF'S SALE.

See LIMITATIONS, 2.

SLANDER.

Where there has been a trial before a competent tribunal, it will be presumed that the testimony given on that trial was material. To charge a man with perjury, in reference to a trial where perjury might be committed, is actionable.—*Whitel v. Lennen*, 535.

STATUTES.

Of Foreign State.] See COSTS, 1, 2.
See FRAUDS, STATUTE OF; HUSBAND AND WIFE, 1, 4, 5, 6, 14, 15; INFANCY, 3; LIMITATIONS; NEW COUNTIES, 2, 3, 5; WAGER, 2; WILL, 9.

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STREETS.

1. Where a person took a contract for the improvement of a street, under the general law for the incorporation of cities, and one of the lots opposite which the street was improved was owned by a non-resident, and the assessment against it being unpaid, it was sold for a sum less than the assessment, it was *held*, that the contractor could not maintain an action against the city for the deficiency.—*The City of New Albany v. Sweeney*, 245.
2. The fee simple in the streets of towns and cities in *Indiana* would seem, during the existence of the corporation, to be in the public. At all events, taking a street is not taking an "interest in the land" of the adjoining proprietor. Yet it is only when such interest is taken, that the act of 1852 authorizes the proceeding for the assessment of damages.—*The New Albany, &c., Railroad Co. v. O'Daily et ux.*, 353.

SUBSCRIPTION OF STOCK.

1. Suit by a railroad company upon a subscription of stock. Answer 1. A denial of the subscription. 2. That the capital stock of the company was fixed by the act of incorporation at 5,000,000 dollars, in shares of 50 dollars each, and that they had no power to issue certificates for a larger sum, except as in the act of incorporation provided as follows: "Provided, that if the capital stock of said company any time subscribed shall be insufficient for the purposes aforesaid of this act, it shall and may be lawful for the president and directors of said company, from time to time, to increase the said stock, by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company." That before the commencement of the suit, the company had issued stock to the amount of 5,000,000 dollars, in shares, &c., and that said amount, &c., was sufficient, &c.; that the president, &c., have not, at any time before the commencement of the suit, increased the capital stock, &c., beyond that amount, nor was the same necessary, &c. 3. That the capital stock was limited to 5,000,000 dollars, and no more, except, &c.; that the plaintiffs fraudulently issued stock to an amount exceeding 5,000,000 dollars, the same not being then and there necessary, &c., and then and thereby rendered the original subscription to the capital stock of the company of no value, and reduced the market price of the stock, &c.; wherefore, &c. Reply to the second paragraph that, after the issue of the stock in said paragraph mentioned to the amount of 5,000,000 dollars, the plaintiffs ordered and directed, as by the said charter was authorized, a further issue, &c., to the amount of 1,500,000 dollars, of which 500,000 dollars has been issued, and that the issue of the further sum of 1,000,000 dollars is authorized; and that the issue of said additional stock was necessary, &c.

Held, first, that the third paragraph of the answer was bad on demurrer.

Second, that the issue formed upon the second paragraph of the answer was material; and that it devolved upon the plaintiffs to prove that the stock had been increased as alleged in their reply.—*McCord v. The Ohio, &c., Railroad Co.*, 220.

2. Suit upon a subscription of stock to be paid in labor and materials within two years from the first election of directors, otherwise, payable in cash. The first paragraph of the complaint alleged neglect and refusal to perform labor, &c., for two years, &c.; that more than

three years had elapsed, &c., whereby, and by reason of such refusal, the amount subscribed had become due in cash. General denial, and special paragraphs averring that the subscription was made under the original charter of the company, and afterwards the company consolidated with another company, and that defendant had never assented to the consolidation. General reply that defendant, before suit, had assented, &c. Demurrer overruled. The second paragraph of the complaint was admitted to be good.

Held, first, that the demurrer reached back to the complaint, as a whole, and as the complaint contained a good paragraph, the demurrer was properly overruled.

Second, that the first paragraph of the complaint was good after verdict, as under its averments a demand for the labor, &c., might be proved, if indeed such proof was at all necessary.

Third, a verdict against the defendant in such case for the amount subscribed in cash, is fully supported by proof that he assented to the consolidation, and made payments upon his subscription subsequently thereto, and that he had refused to perform the labor, &c. The written subscription proved itself.—*Hayworth v. The Junction Railroad Co.*, 348.

3. Where the charter under which a subscription was made provided that subscriptions should be collected without relief, &c., and suit is brought upon the subscription, after a consolidation with another company, judgment is properly rendered without relief, &c.—*Ibid*.

See RAILROAD COMPANY, 11, 14, 15, 16.

SUNDAY.

Sale upon.]

See CONTRACT, 7.

T.

TAXES.

See APPEAL, 1, 2.

TITLE BOND.

See DEED, 7, 8.

TITLE TO REAL ESTATE.

See MALICIOUS TRESPASS.

TORT.

Action arising out of, not divisible.]

See ACTION.

See COSTS, 3.

TOWNS AND CITIES.

The mayors of towns and cities have the jurisdiction, under the laws of the state, of justices of the peace.—*Cluggish v. Rogers*, 538.

See CEMETERIES AND SEPULTURE; ELECTIONS; STREETS.

TRESPASS.

Where a levy was wrongfully made upon part of a lot of saw-logs, without distinguishing what part, and the part levied upon was sold without being pointed out or separated from the rest, and the purchaser never took possession or attempted to exercise any control over the property, it was *held*, that an action in the nature of trespass would not lie against the officer and the purchaser.—*Conkey et al. v. Amis*, 260.

TRUSTS.

See EXECUTORS AND ADMINISTRATORS, 1; PARTNERSHIP, 1.

U.

USURY.

1. Information for usury as follows: That *A.*, on, &c., at, &c., did then and there unlawfully bargain for a greater rate of interest, &c. *Held*, that this is sufficient without the use of the words *corruptly* and *usuriously*.—*Marble v. The State*, 362.
2. The information also alleged that said *B.* did then and there loan *from* the said *A.*, &c., instead of saying that said *A.* did then and there loan *to* the said *B.* *Held*, that this was not a substantial defect.—*Ibid.*

See PROMISSORY NOTES, 9, 12, 13.

V.

VENDOR AND PURCHASER.

1. A sale and conveyance of land, with the agreement that the vendor should hold possession and use the property until the vendee sold it, covenanting to then give up the premises in as good repair as when the vendee purchased them, upon the payment of a balance of the purchase-money, was *held* to be absolute; and the agreement was held to be, in effect, a mortgage to secure the balance of the purchase-money.—*Gibson v. Eller et al.*, 124.
2. The failure of the vendee, in such case, to pay the purchase-money within a reasonable time, would authorize a foreclosure against him.—*Ibid.*
3. And where damage to an amount equal to the purchase-money due, occurs to premises so held by a vendor, through his negligence or misconduct, the vendee may have an accounting with the vendor, and have his title quieted, without alleging a tender of the purchase-money. It will be sufficient if the complaint contain an offer to pay what may be found due the vendor.—*Ibid.*
4. Where buildings upon premises so held by a vendor, are destroyed by fire through his negligence or misconduct, he must rebuild them; otherwise the vendee will be entitled to a deduction from the purchase-money of an amount equal to the cost of rebuilding.—*Ibid.*

Of Goods.]

See CONTRACT, 2 to 7; SALE.

Of Lands.]

See LANDLORD AND TENANT, 2, 3, 6.

VENUE.

1. A change of venue must, in civil actions, be granted upon a proper application. The Court has no discretion.—*Shattuck v. Myers*, 46.
2. As a general rule, an application for a change of venue must be made and supported by the affidavit of the party in person. The affidavit of his attorney will not compel the change.—*Ibid.*
3. There are exceptions to this rule; as in suits by or against corporations.—*Ibid.*
4. It is within the sound, legal discretion of the Court to grant or refuse a change of venue, upon application and affidavit by a person not a party to the record.—*Ibid.*

VERDICT.

1. As a general rule; a verdict is not effective for any purpose, unless followed by an adjudication of the Court.—*Shirk v. Wilson*, 129.

2. Unless otherwise instructed by the Court, the jury may render either a general or a special verdict; but upon the request of either party, the Court must direct a special verdict upon all or any of the issues; and if requested by either party, the Court must direct the jury that if they find a general verdict they must find specially upon particular questions of fact.—*The Michigan, &c., Railroad Co. v. Bivens*, 263.
3. Complaint in two counts, first, upon a note, and second, upon an account stated. The answer set up to the first count, usury, alterations, &c., and to the second, that the note had been given in payment of the account. Verdict "for the plaintiff on the counting, 166 dollars, 50 cents, without interest on said claim, regarding said note invalid." The evidence was not in the record on appeal. *Held*, that the verdict, though informal, is substantially for the defendant on the first count, and for the plaintiff on the second.—*Collins v. Makepeace*, 448.

See PROMISSORY NOTES, 1; REPLEVIN, 2; SUBSCRIPTION OF STOCK, 2.

VERIFICATION.

See PLEADING, 13.

W.

WAGER.

1. Where the pleadings show that money passed into the hands of the defendant as stakeholder of a wager upon the result of an election, an action may be maintained against him by the party who disaffirms the illegal contract, and notifies him thereof before the money is paid to the other contracting party.—*Burroughs et al. v. Hunt*, 178.
2. Section 2, 1 R. S. p. 305, has reference to the rights and remedies of parties to certain illegal contracts, as between themselves, and not to the right of action, nor the time within which it must be brought against a stakeholder.—*Ibid*.
3. A wager upon the result of an election being illegal, the Courts will not aid the winner in recovering it, in an action against the stakeholder.—*Worthington et al. v. Black*, 344.

See GAMING.

WARRANT OF ATTORNEY.

See JUDGMENT BY CONFESSION.

WARRANTY.

See CONTRACT, 5, 6.

WAYS.

See RAILROAD COMPANY; STREETS.

WILL.

1. If a devise be made upon a condition subsequent, the estate vests in the devisee immediately upon the death of the deviser, to be defeated, however, if he refuse or neglect to perform the condition. And where a power is given to the executor to make another disposition of the estate in case of such refusal or neglect, and he proceeds under the power, a party claiming under him in a suit against the devisee for possession, must prove condition broken.—*Petro et al. v. Cassidy*, 289.

2. Where the evidence showed that the devisee had offered to perform the condition, but the person on whose behalf it was made had refused to accept, and never afterwards asked performance, it was *held*, in support of the verdict of a jury, that the failure to perform was not a violation of the condition, but that the devisee was released from its performance.—*Ibid*.
3. Where a will vested a fee simple in the children of the testator, with the condition that they should support his widow and one of his sons during life, furnishing them a residence, and provided that upon failure of such support, &c., the devisees, or either of them, might subject the land to the payment of any debts necessarily incurred for their maintenance, &c., it was *held* that the will did not give the widow the primary right to control the land.—*Thomas v. Boyd*, 333.
4. *Quære*, whether leasing the land was the proper course to be pursued by the widow, upon condition broken, to subject the land, &c.—*Ibid*.
5. Where a testator devised his entire estate to his son, and provided that if he should die "without a lawful heir or heirs," the estate should go to the children of his daughter, it was *held*, that the words *lawful heir or heirs* were used in the limited sense of *child* or heir of the body at the time of the son's death.—*Jones et al. v. Miller et al.*, 337.
6. Upon the death of the son without issue, the estate of the daughter's children could be sustained as being taken by an executory devise.—*Ibid*.
7. A fee may thus be limited after a fee.—*Ibid*.
8. A conveyance by the son before his death could not destroy or affect the estate limited to the children.—*Ibid*.
9. The estate thus created is not without our statute against perpetuities.—*Ibid*.
10. The first item of the disposing part of the will in this case, was a bequest to the wife of the testator, of all his real estate, &c., personal estate, &c., and everything he had or owned at the time of his decease, for her life, she paying his debts, and a certain legacy. It was then provided that said legacy should be paid by the wife, not by the executor. Other special legacies are then provided for, to be paid after the death of the wife, out of such part of the personal estate as might be in her hands at the time of her death; and if the personal estate was not sufficient for that purpose, land was to be sold, &c.; but no provision was made for a resort to the executor to obtain funds for that purpose. Certain residuary legacies are then set forth, to be operative after the death of the wife. Then followed a provision that she should use all the personal estate, and the rents and profits of the real estate, "or so much thereof as she may require for her use and benefit;" but this is followed immediately by this language—"and may and shall have the absolute use of all my said real and personal estate, for and during the term of her natural life, and no longer;" and then again the expression occurs, that she "shall use, expend, and consume such parts of my personal estate, and the rents, issues, and profits of my real estate, as she may require for her own use and benefit." Then followed a clause declaring that his business partnerships might be continued for the benefit of his wife as long as his executors should think the interest of his estate might require it.
Held, that the will, as a whole, discloses that the testator intended to give his wife the absolute control of his real and personal property, for her use, during her life.—*Anderegg v. Ross*, 413.

See APPEAL, 3, 4, 5; DESCENTS.

WITNESS.

1. What weight, if any, should be given to the statements of a witness who has been impeached by general evidence; or to the uncontradicted statements of a witness whose testi-

mony has been, as to some points, successfully attacked by other witnesses?—is a question for the jury.—*Terry v. The State*, 70.

2. An instruction to the jury assuming that there has been no impeachment of a witness, and that there is but one mode of impeaching a witness, namely, by evidence of general bad character, was held to be erroneous.—*Ibid*.

See APPEAL, 10; CRIMINAL LAW, 6 to 10; HUSBAND AND WIFE, 8, 9.

WRITTEN INSTRUMENT.

See PLEADING, 1, 2.

END OF VOL. XIII.

E. R. T. C.

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